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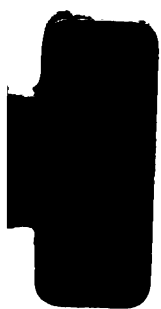
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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
English Ecclesiastical Courts:
WITH
TABLES OF THE CASES AND PRINCIPAL MATTERS.

EDITED BY
EDWARD D. INGRAHAM, Esquire,
OF THE PHILADELPHIA BAR.

VOL. IV.

CONTAINING
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AND
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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
ECCLESIASTICAL COURTS,
AT
Doctors' Commons,
AND IN THE
HIGH COURT OF DELEGATES.

By JOHN HAGGARD, LL. D.

VOL. II.

CONTAINING CASES FROM MICHAELMAS TERM, 1828, TO TRINITY TERM 1829, INCLUSIVE, AND SOME CASES OF AN EARLIER DATE.

VOL. IV.

2



CASES
ARGUED AND DETERMINED
IN THE
ECCLESIASTICAL COURTS.

ARCHES COURT OF CANTERBURY.

COURTAIL v. HOMFRAY.—p. 1.

In a defamation suit, the defendant having been enjoined penance, and condemned in costs; and to an appeal from his dismissal without such penance being duly performed, having given an affirmative issue, the Court directed penance to be performed, as originally decreed, and condemned the defendant in the further costs. Though an affirmative issue to a libel of appeal from a definitive sentence be given, the process must be transmitted, where the Court of appeal has to take any step requiring a knowledge of the proceedings, or of the sentence of the Court below.

BROWN v. BROWN.—p. 5.

An assignment, apparently fraudulent and colorable, by the husband of all his property after the commencement of a suit by the wife for divorce, cannot affect her title to alimony *pendente lite*. The Court allotted alimony *pendente lite* at the rate of 50*l.* per annum out of an income of 140*l.*, and refused to allow the motion not to issue till after fifteen days.

THIS was a cause of divorce brought by the wife against the husband; and the present application respected alimony *pendente lite*. (a)
The *King's Advocate* and *Lushington*, for Mrs. Brown.
Phillimore and *Addams*, contra.

JUDGMENT.

Sir JOHN NICHOLL.

The affidavits upon which the husband's counsel have commented, were made a year and a half ago, and for the purpose of allotting money on account of alimony: I infer that from the date of them, just prior to the long vacation in 1827, when a sum of 50*l.* was decreed to the wife. The Court cannot now advert to them. If, as it has been asserted, the

(a) The earlier stages of this cause are reported in 1 Haggard, 523.

wife is entitled to a separate income of forty guineas, payable by a Mr. Rowlett, the husband should have stated that circumstance in his answers or put it into plea: but the assertion is directly in opposition to Rowlett's affidavit: "That he does not consider there is the slightest obligation upon him to continue the allowance." The question then must be decided on the answers.

The suit is brought by the wife against her husband for cruelty and adultery, and she was put to a considerable difficulty at the outset, for the husband having denied the validity of the marriage she was compelled to prove it. This necessarily entailed on her much expense, and only 50*l.* has been allotted on account of alimony. The Court saw, in the aspect of the suit, sufficient to wish that it might terminate in some arrangement out of Court, but that recommendation failed and the wife is now proceeding in her original suit. There being then a valid marriage and no proof of a separate income, the wife is entitled to a maintenance pending the cause, and that maintenance must be allotted according to the husband's faculties. He does not deny that at the commencement of the suit, and I should think up to a pretty late period, he was possessed of certain property and income now conveyed in trust for the children of a former marriage. Some of them are grown up; for the son has been examined as a witness, and a daughter is the wife of the trustee to whom the property is assigned. Brown has thought fit to abandon farming, and has conveyed away not only the land, but his stock, crops, and even household furniture; and this too since the suit began; the intended effect of this assignment then is to deprive his wife of her maintenance. I do not mean to suggest that this assignment was made with the knowledge, much less by the advice, of the practitioners here; but I must consider it fraudulent and colourable. If such a contrivance could avail, no injured wife could ever hope for justice. I shall consider the case therefore as if no such circumstance had appeared.

What is his income? A person who would resort to such contrivances will not have the credit of over estimating his property; he would rather be suspected of undervaluing it. He admits that, at the commencement of this suit, he had a copyhold farm of eighty acres, of the value of 4,200*l.*; but that it is incumbered with a mortgage of 1200*l.*; he admits, however, that this property is tithe free; and that the husbandry implements, the stock and crops *communibus annis*, were worth 500*l.*, and that his furniture was worth 50*l.*; but he asserts that now there is nothing remaining to him except his mere wearing apparel. If the effect of the assignment has been to leave him so destitute, I am surprised that he has not applied to sue *in forma pauperis*. However, the income out of his farm was at least 200*l.*, but it was reduced to 140*l.* by the payment of the interest of the mortgage. Mrs. Brown is entitled to be alimented as if living with him as his wife, and the wife of such a person could not maintain herself decently for less than 50*l.* per annum. I shall, on these grounds, and more especially, seeing the means to which he has resorted for reducing his faculties, allow her that sum; and he must betake himself to some occupation in order to enable him to provide the necessary funds for this allowance. I must repeat strongly my earnest recommendation that this case should be settled out of Court.

I allot 50*l.* a year as alimony, pending suit, to commence from the return of the citation, the money already paid on account being first deducted.

The Proctor of the husband prayed, that the monition should not go out till after fifteen days.

THE COURT said, that the suit had already been depending two years; that the wife had had only 80*l.*, and that consequently there was still a balance due to her. The delay in the issue of the monition was quite unusual, and it saw no reason for departing from the ordinary practice.

224.

52.11.

748.2.17.22

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HAMERTON v. HAMERTON.—p. 8.

When no indecent familiarity, proximate act, or personal freedom (except two kisses), and no circumstances inferring adultery, are proved; letters from the alleged paramour, found in the wife's possession, but not necessarily implying the commission of adultery, will not support a sentence of separation by reason of her adultery: but if the evidence raises a suspicion that an adulterous intercourse is carrying on between the parties accused, the Court may, upon affidavits, rescind the conclusion, and allow the husband to give in an allegation.

The Court cannot separate on improper conduct short of actual adultery. The law does not require direct evidence of the very act committed at a specific time and place; but the Court must be satisfied that actual adultery has been committed.

THIS case, in some of its earlier stages, is reported in 1 Haggard, 23. It was now, at the hearing, argued by *Lushington* and *Dodson*, for Major Hamerton; and by the *King's Advocate* and *Addams*, contra.

JUDGMENT.

SIR JOHN NICHOLL.

This is a suit for separation *a mensa et thoro*, by reason of adultery, brought by the husband against his wife. The parties, Major William Hamerton, an officer of Artillery, and Miss Isabella Romer, were married at the British Ambassador's chapel at Paris, in December, 1818, and of that marriage, which is confessed and sufficiently proved as the substratum of the suit, there is issue one daughter now living, and about nine years of age.

The parties cohabited together from their marriage, and up to the 25th of March, 1827, at various places—principally abroad; but, for the last seventeen months of that period, at Cheltenham: they then separated, he having dismissed her his house on finding certain letters; and no subsequent cohabitation is suggested; for she soon after went with her mother to Tours in France, and has ever since remained abroad.

During their residence at Cheltenham, which began in August, 1825, they lived, first, at a house in Montague Place till the spring of 1826, and then removed to Fancy Hall, where they continued the remainder of the time. At No. 1, Bellevue Place, near their former residence, there dwelt an elderly lady, the widow of an officer of rank, Mrs. Matthews, who had been the intimate friend of Mrs. Romer, the mother of Mrs. Hamerton, and of Mrs. Hamerton herself from her infancy.

The libel charges adultery with Mr. Bushe, a married man, who with his wife, Lady Louisa Bushe, lived at No. 2. Oxford Terrace. The acquaintance is alleged to have commenced at a fancy ball given by

Mrs. Hamerton in January 1826; though from some part of the evidence it appears, that an acquaintance between Mr. Bushe and Major Hamerton subsisted previously.

The fifth article of the libel pleads that Mrs. Hamerton and Bushe first became acquainted at a fancy ball, to which I have just referred, and then alleges "that soon after the commencement of their acquaintance an improper intimacy entirely unknown to the husband took place between them, and that at such time they have committed adultery." The sixth pleads "that in the spring of 1827 Bushe availed himself of every opportunity unknown to Hamerton, and during his absence out hunting or elsewhere, to keep up an improper intercourse with Mrs. Hamerton; that he very frequently met her by appointment (particularly at the house of Mrs. Mathews, No. 1, Bellevue Place, Cheltenham), and on many occasions gave her notes or letters, conversed with her for considerable periods of time, and occasionally in French." No adultery nor indecent familiarity is specifically alleged in either of these two articles; no impropriety but this correspondence by notes. Now, that subsequent to this acquaintance, a great intimacy arose, and that frequent interviews in the streets and at other places by appointment, and that improper conduct took place, is pleaded in the eighth and ninth articles. (a) The eighth alleges, "that in March or April, 1826, Mrs. Hamerton, being out in the carriage with her little girl, met Bushe, who said to her in French, 'If you will go to No. 1, Bellevue Place, I will meet you there;' that she immediately returned home, left her daughter, and proceeded to No. 1, Bellevue Place, where on her arrival she was met by Bushe: that Mrs. Mathews went up stairs; and that Bushe and Mrs. Hamerton remained alone together in the parlour, (the blinds of which were drawn down) for upwards of twenty minutes, and during such time committed adultery." Here is an averment of adultery, but the witnesses examined do not prove, in this parlour, (for there it is laid) any indecent familiarity, nor any thing beyond a mere visit. It is true that the blinds were down, but that was the habit of the house: it cannot be pretended that these averments of adultery are in any way proved, so that the Court can receive them as a fact established against the wife.

The ninth article pleads, "that a few days afterwards, being in or about March or April 1826, Mrs. Hamerton being in her carriage, in the High Street, Cheltenham, met Bushe, who, after conversing with her, ordered the carriage to go to Malcolm Ghur, (a retired spot in the outskirts of the town) the residence of Major and Mrs. Croker; that the footman then told Mrs. Hamerton he had just seen them pass by, but she desired him to go to Malcolm Ghur: that on arriving there, the footman knocked at the house door, and returning to the carriage found Bushe with Mrs. Hamerton, and they remained together alone for above half an hour."

I do not understand that any impropriety or familiarity is alleged on that occasion.

The tenth article alleges, that about a month after the meeting, pleaded in the ninth article, (being therefore in March or April) Major

(a) The seventh article, in substance, pleaded, "that Mrs. Hamerton, after her intimacy with Bushe, entirely changed her usual habits, and became very inattentive to her child of whom she had been previously exceedingly fond."

Hamerton, having reason to believe that Bushe was a person of loose morals, desired his wife to break off all acquaintance with, and to cease speaking to, him; that notwithstanding such direction, she continued clandestinely to meet Bushe, and keep up an adulterous intercourse with him."

Of this interdict at this time there is no proof. Two witnesses are examined on this article. Parsloe, who was in Captain Mathews' service while at his mother's at Cheltenham, in the spring of 1826, knows of no interdict. Welch, Major Hamerton's footman, speaks to an interdict in January, 1827. Undoubtedly if Major Hamerton was persuaded that Bushe, a man of dissolute habits, was in pursuit of his wife, though he cannot be suspected of criminal imprudence or connivance; yet it would have been an act of more caution if he had withdrawn from Cheltenham, a mere casual residence, where his frequent absences in hunting exposed his wife more unprotectedly to Bushe's approaches. Though this does not amount to connivance, one of the basest offences that can be imputed, yet it does amount to want of prudence, particularly considering the opportunities that the habits of such a town as Cheltenham furnish. The eleventh and twelfth articles plead facts which I will consider hereafter.

The thirteenth charges adultery in London, and at a house near Fulham; but there is no proof that the parties ever met in London or at Fulham.

On the fourteenth article, there is no evidence that any thing criminal occurred at Pittville in July 1826.

The fifteenth alleges a meeting at the house of one Adamson; but there is no proof that they were ever in the house together. This is laid as happening the latter end of February 1827, and it is proved that Mrs. Hamerton was seen coming out of that street and going to Colonel Ollney's, and that Bushe also came out of the street soon afterwards and went to his own house. This may be suspicious, but it is no proof that they had seen each other, much less that they had met at Adamson's, and there committed adultery. It is charged that she was much flushed, and that her dress was disordered when she arrived at Colonel Ollney's, and on her return home. If it had been proved that she had been at Adamson's, these other circumstances might have aided, but no meeting is proved; and considering she was naturally of a florid complexion, and had walked through the air in the month of February, it is not surprising that her colour should be heightened: at Colonel Ollney's she sat by the fire and had a handscreen; she again walked through the air home, and appearing flushed when she arrived there, her husband asked, "What made her face look so red," and said, "It looked very odd;" he was suspicious and showed himself jealous; but there was no disorder of dress that the servant observed either at that time, or when she dressed her hair before dinner; no agitation of manner that attracted attention; nothing to show improper personal correspondence.

The next charge, on the sixteenth article, is at a house called the Pavilion. Bushe took this house on the fourth of March, 1827, and the separation took place on the 25th, and there is no proof that Mrs. Hamerton ever was in that house, nor is it even to be inferred from the letters of Bushe found in her possession.

As far then as the oral evidence goes, there is no proof of actual

adultery. If there is any proof it must be on the eleventh and twelfth articles, which plead the letters. These letters begin in January and end on the 15th of March; and Bushe, in the last of them, talks of returning to Cheltenham on the 25th, on which day the discovery was made.

19. + What then are the proofs on the libel of actual adultery? for the Court cannot separate on improper conduct, short of actual adultery; such conduct may lead up to the proof of guilt; and it is true that the law does not require direct evidence of the very fact committed at a specific time and place, but it does require the Court to be satisfied that actual adultery has been committed. That is the principle laid down and admitted by the counsel on both sides, "that there must be a surrender of her person to the embraces of the party with whom the offence is charged." Though the intercourse is alleged to have been kept up for above twelve months, and though thirty witnesses have been examined, yet no indecent familiarity is even laid; no proximate act is pleaded in the libel; and no personal freedoms are observed, except that
 * two witnesses speak to a kiss; one, on a staircase at a ball; the other, while Bushe was handing her into the carriage, the witness standing at
 * the door of the house. These kisses are not pleaded in the fifth article, on which the witnesses depose to them, are not strictly evidence on that article, and should scarcely have been taken down. Herbert, a confectioner at Cheltenham, of the age of twenty only at the time of his examination, speaks to the first. It was at the fancy ball in January, 1826—the very commencement of their acquaintance; though Welch says, that Hamerton and Bushe were acquainted long before. Mrs. Hamerton undoubtedly ought to have resented this conduct; but it is a slight
 * circumstance except as showing the assurance and libertinism of Bushe.

The other witness is Main: he says "that he was waiting at a party at Colonel Crowder's, about March, 1826, and that, while at the hall-door, he heard the sound of a kiss after Bushe had handed Mrs. Hamerton into the carriage; and that they afterwards shook hands." The
 * kiss, then, might be on the hand; for it is not very credible that she should have ventured further in sight of this servant. The fact, I repeat, is not pleaded, and at the utmost it is slight. No other personal familiarity is then spoken to, except the shaking of hands, which is so almost universally practised in modern manners, that it cannot lead to an inference of improper intimacy: whether the constant habit tends much to support the delicacy and propriety of females may admit of different opinions, it is to be considered as the common intercourse of society that may occur without guilt.

11.7.4 + What then is the proof of guilt at Mrs. Mathews'? The charges are laid in the sixth, eighth, eleventh, and twelfth articles. The sixth is a mere general and introductory article; and I have sufficiently noticed it. The eighth also has been adverted to; and I may here again remark, that in that room the blinds were usually down; there was no sofa in it; no familiarity was seen, and the door was not fastened. No witness, though three have been examined, ventures, upon any sufficient ground, to swear to a belief that adultery was committed in that parlour. Welch rather negatives it.

The eleventh and twelfth articles are very loose: hardly time or place is so specifically fixed as to afford an opportunity to meet the charge. The eleventh pleads "that notwithstanding the direction given by Ma-

jor Hamerton to his wife (as set forth in the tenth article) and within a few days after, she stopped and conversed with Bushe in Sherborne Walk; that they again shortly afterwards made an appointment to meet at Mrs. Mathews', at No. 1, Bellevue Place, at the door of whose house he met her, and they went in together, and remained in one of the rooms with the blinds drawn down for a considerable time; and on that occasion committed adultery." But the twelfth article is the most important. It pleads "that during the summer, autumn, and winter of 1826, and the beginning of 1827, Bushe and Mrs. Hamerton continued clandestinely to carry on their intimacy; that on several occasions, and particularly in July and December, 1826, and also in January and February, 1827, they met at No. 1, Bellevue Place, and remained for considerable spaces of time alone together in a room belonging to that house, and then and there on each of these occasions committed adultery." 402.45: 7.428.

This is laid in such a way that it is impossible for the party to defend herself. Nothing but very clear evidence, that they did meet on some occasion, would very consistently with justice warrant the Court in concluding that she was guilty of the crime imputed: it must be such evidence as would allow the wife to counterplead even after publication.

Two maid-servants, Hargrave and Bright, depose to these articles. To what does their evidence amount? Mrs. Hamerton was almost an adopted child of Mrs. Mathews; she was very frequently at her house, at all times of the day. Mrs. Mathews had a son, Captain Mathews, who according to the evidence of Parsloe and Bright, was staying at her house eight or nine months till June 1826. Bushe was intimately acquainted with Captain Mathews, and often called upon him; Bushe, too, probably might go still more frequently for the sake of seeing and of endeavouring to seduce Mrs. Hamerton; but after Captain Mathews left Cheltenham in June 1826, Mrs. Romer, Mrs. Hamerton's mother, was at Mrs. Mathews' for three or four months in that year: and Hargrave says, "that during that time Bushe did not come at all to Mrs. Mathews'"; and the libel leaves a chasm in the meetings from July till December 1826. The same witness says, "that after Mrs. Romer was gone, Bushe and Mrs. Hamerton were never left alone together by Mrs. Mathews, except for a few minutes;" and Bright thus deposes, "she well remembers that for some time before the separation, Mrs. Mathews did not ever leave Bushe and Mrs. Hamerton alone together."

Mrs. Hamerton had a husband who suspected and cautioned her, and she would have acted more properly and prudently if she had carefully avoided Mr. Bushe upon any occasion. Upon one occasion, however, Mr. Hamerton dined out, and she took an early dinner with Mrs. Mathews; while they were at dinner Bushe called; he was shown up into the drawing room; there Mrs. Hamerton immediately went to receive and entertain him. There is nothing extraordinary or unusual in this interview disconnected from other circumstances, the kisses and meetings; it is only what might occur in any family: the hour of visiting was not passed; a visitor was announced; Mrs. Hamerton might have said, "I'll go up stairs and entertain him while you finish your dinner." The old lady staid and finished her dinner; afterwards, according to her custom, she went to her bed-room, attended by her maid, and then came down to Mrs. Hamerton and Mr. Bushe into the drawing-room. Here then they were alone together for some time, and there was a possibility of the act of adultery. But if any one else had called, the transaction

would have taken the same course. Thus viewed, it is an ordinary occurrence, from which no inference of adultery can be drawn. One of the witnesses, the cook, thinks they must have committed adultery; but she is a very forward witness. The housemaid can say nothing as to the adultery; she can form no belief as to that; and there is nothing to warrant the Court in drawing that conclusion; no fastened doors; no forbidding of interruption; no marks on the sofa; no discomposure of dress; no familiarity seen. The husband has not ventured to cross-examine Mrs. Mathews. There is nothing, therefore, but what is consistent with the most perfect innocence. It may, connected with other circumstances, be suspicious: there might be familiarities, a pressing to the heart, as the letters would seem to indicate; but there is nothing to justify the Court in concluding that which must consign Mrs. Hamerton to disgrace.

There is another circumstance not entirely to be laid out of the case. From the libel it is to be inferred that Mrs. Mathews was privy to, and conniving at, the adultery. The cook seems to suggest that. If so, Mrs. Mathews must be one of the most infamous, most abandoned, and most profligate of women. She would be a procuress and be almost prostituting her own daughter. Up to this time Mrs. Mathews was considered as a most respectable person. Sir Alexander Bryce, and the Reverend Dr. Yates, two of her intimate acquaintance, give her the highest character. She was also the intimate and dear friend and benefactress of Mrs. Hamerton's mother; she had almost brought up Mrs. Hamerton as her own child; she has been examined as a witness, and consequently exposed to a cross-examination, but Major Hamerton has not addressed to her a single question. She states, "that she would on no account have lent herself to any connexion of a criminal nature between Isabella Frances Hamerton and John Bushe, or any other parties." And at the end of her evidence on the second article, is this passage: "Deponent verily believes that on no occasion of the meeting of the said parties at her house did they commit adultery: the thing was morally impossible." So then Mrs. Mathews, as far as in her lies, negatives the commission of adultery at her house, and if the offence was not consummated there, there is no other place where there is any semblance of its having been effected; the husband then has failed in his charge, though he has examined thirty witnesses, and the wife is entitled to her dismissal upon the oral evidence.

But there are letters exhibited, addressed by Mr. Bushe to Mrs. Hamerton under the feigned name of Mrs. Godolphin; and it is proved that she fetched and received these letters from the Post Office. They are written, as I have before said, between the 10th of January and 15th of March 1827. There is an allusion in several of them to Mrs. M., and in one of them, No. 8, to a note from Mrs. Hamerton inclosed by Mrs. M.—If by Mrs. M. was meant Mrs. Mathews, it would give a very unfavourable colour to her conduct and evidence—perhaps even a different aspect to the charge. But who Mrs. M. is, has not been explained in the evidence. It has not been pleaded, that by Mrs. M. was meant Mrs. Mathews. There is, I observe, at the end of the letter, No. 8, a reference to a Miss M. Now in the evidence there is no mention of Mrs. Mathews having any daughter, and therefore I see no reason to suppose that Mrs. M. meant Mrs. Mathews. No interrogatory has been put to Mrs. Mathews to know whether she had forwarded a note, and if she had, to explain how it happened.

The letters have been much examined and commented upon. I have + read them over and over again; but I do not intend to follow the counsel in their comments. They are written in an ardent and romantic strain; Bushe soliciting interviews for criminal purposes, for it is impossible his object, in thus addressing a married woman, could have been other than criminal, or that when a married woman receives such letters from a married man, but that she must know they were for licentious purposes. Still however some women will go a great way without proceeding to the last extremity of guilt; and the Court must be satisfied not only that there has been a surrender of the mind, but of the person. It has been argued, that these letters show that actual guilt had passed; but on reading them, and after the argument, I think they contain no unequivocal reference to, nor inference of, any act of adultery committed. The parts relied on are capable of explanation, though attended with much suspicion: and when the oral evidence has entirely failed in establishing the offence, and no occasion can be pointed out when adultery was actually committed; and when even these letters do not refer retrospectively to meetings at any particular time or place, it would be too much to say that such equivocal documents can be admitted as sufficient and conclusive proof. +16.

The letters seem to show that she had consented to an interview, and had promised that she at last would meet him at the Pavilion. They are, as already observed, strange extravagant stuff, breathing the most ardent affection, and soliciting interviews, written by a profligate libertine, professing something like an honourable attachment to a weak, vain, silly woman: he a married man and she a married woman. It was highly blameable on her part to allow this correspondence, but it is hardly possible, considering the profligate character of the writer, but that they would have contained some strong and unequivocal reference to an adulterous connexion having previously taken place, some more direct and more gross allusions to past criminality, if she had surrendered her person. I do not go so far as to say that they negative adultery, but coupled with the want of oral evidence, they do not sustain the charge.

Thus then stands the evidence on the libel, and on it I do not feel myself warranted in pronouncing the adultery to be proved. There is, however, an additional article alleging a renewal of adultery at Paris, where it is pleaded Mrs. Hamerton took up her residence in the early part of February, after she had removed from her mother's house at Tours. Now the only witness to this part of the case is an attorney's + clerk, a young man, not more than twenty years' old, and he was sent over to Paris, in March or April, for the purpose of collecting evidence. Surely, if such was the object of his journey, it is a further reason why the Court must consider the only proof, now adduced on this article, insufficient and unsatisfactory. The whole of this witness' evidence is, "that on the 5th of April, he saw Mrs. Hamerton get into a carriage at No. 51, in a street he describes, and that after driving about for nearly an hour, she returned to a street, close adjoining, and there entered a house, No. 3; after which the carriage drove away with a lady in it. He says, Mrs. Hamerton remained in that house for about four hours, and then walked home alone; and that shortly afterwards he saw Bushe come out of the same house, dressed as if he had not been out before on that day." How could that be known to the witness? Bushe might

x have gone in dressed, while the witness was absent, and besides it is not proved that Mrs. Hamerton knew Bushe was in the house. "In less than a week afterwards, he saw Bushe get into a coach at No. 3, and, at No. 51, Mrs. Hamerton and another female, with bundles, get into it." This is a circumstance leading to a suspicion that Bushe and Mrs. Hamerton were renewing their intercourse. She happened casually to be at Paris; and there is nothing to show that the meeting was other than accidental. If innocent, she might be ignorant that Bushe was at the house, No. 51; and the female accompanying her, when seen with the bundles, might be her mother; they might then have been going back together to Tours; and Bushe might have called to make contrite apologies for having, by his former attentions, brought upon her these accusations. The circumstance however is certainly suspicious; but the wife is abroad, and this forms no part of the original charge. The Court, therefore, would not be warranted in drawing a conclusion of criminality, when the facts were capable of a construction of innocence. It must have proof of guilt, and it cannot listen to any excuse offered on the ground of the expense, that would be necessarily incurred, in examining witnesses by commission at Paris.

13. As was strongly urged by the counsel for the husband, it is a great hardship for him to remain liable to cohabitation with a wife so imprudent, and so culpable, as to allow of this correspondence: but still the presumption is in favour of innocence, and without proof of actual criminality—of real adultery—it would be an injustice to cast her upon the world without a provision. No application is, as I understand, at present made to the Court, on the part of the husband, to rescind the conclusion, and permit him to go into further evidence, or to give in further articles. If he is desirous of doing so, the Court would be very unwilling to refuse an application of that kind, when there is proof of such criminality on the part of the wife.

12391. Upon the application of the counsel for Major Hamerton, the cause was directed to stand over; and on the third session of Hilary Term, 1829, his affidavit was exhibited, which—after stating that his Proctor, and William Gyde, had, about the 25th of November, 1828, gone to Paris in order to make inquiries respecting Mrs. Hamerton; and after stating the result of those inquiries,—thus proceeded: "that he has been informed and verily believes that, on or about the 20th of December, 1828, and not before, it was ascertained that evidence could be adduced in proof of the facts pleaded, and that the facts have come to his knowledge since the said 25th of November, and that he verily believes that he shall be able to prove the contents of his allegation." This affidavit was corroborated by that of Mr. Gyde.

Upon these affidavits the Court rescinded the conclusion of the cause, and allowed an allegation to be brought in. (a) From this order an appeal was immediately entered.

(a) It is a known maxim in the civil law, "*Causa nunquam concluditur contra judicem*:" Oughton, tit. 117. s. 3. m. "*Quoad Judicem*," says Gail, "*nunquam in causâ concluditur, et ideo ex officio conclusionem rescindere, ulterioremque probationem partibus injungere potest.*" Pract. Obs. lib. 1. Observ. 107. s. 5. *et seq.*—This principle has been frequently adverted to and adopted in matrimonial causes. See *Elwes v. Elwes*, 1 Consist. Rep. 292. *Searle v. Price*, 2 Cons. Rep. 191. *Wyatt v. Henry*, Ib. 219. And the editor has printed, in a Supplement, some notes of other cases where the same principle has been recognized and acted upon by Lord Stowell, and the late Sir William Wynne. Vide "*Supplement*," p. 134. *et seq.*

The Office of the Judge promoted by
BENNETT v. BONAHER, Clerk.—p. 25.

The Court is bound to admit articles by a church warden against an incumbent for frequent irregularities in the performance of divine service, and of parochial duties, and also for his violating the churchyard: nor (the suit being commenced in April 1828, and the alleged offences being laid from September 1824, till January 1827) is the lapse of time any bar.

By the general law the church service ought to be regularly performed every Sunday morning and evening. Any relaxation is to be supposed to have been permitted by the diocesan, owing to the circumstances of the parish; and the terms prescribed must be strictly observed.

The Office of the Judge promoted by
MOYSEY, D. D. v. HILLCOAT, D. D.—p. 30.

A chapel being shortly before 1735 built by private subscription, and subscribers agreeing, out of the pew rents, to pay the Rector of the parish a yearly stipend for performing divine service, a license was obtained from the Bishop to the Rector and his successors, who, from time to time, performed therein parochial duties, but there was no proof of consecration, nor any of composition, between the patron, incumbent, and ordinary; such chapel is merely proprietary, and the Minister, nominated by the Rector of the parish and licensed by the Bishop, cannot perform parochial duties therein, nor distribute the alms collected at the Lord's supper.

The incumbent of the parish has a right without licence to perform divine service in any consecrated building within the parish. *Semble*, therefore, a licence to the rector from the ordinary, to perform divine service in a chapel, tends to show that the chapel was not consecrated.

Proprietary chapels are anomalies unknown to the constitution, and to the ecclesiastical establishments of the church of England, and can possess no parochial rights.

Prima facie all parochial duties are committed to, and imposed upon, the parish incumbent, and all fees and emoluments arising therefrom belong to him; and such rights can only be granted to a chapel, or its officiating minister, by composition with the patron, incumbent and ordinary: *quære*, whether not also with a compensation to future incumbents.

The performance of baptisms, marriages, and burials, in a chapel existing from time immemorial, might possibly be presumptive evidence of consecration, and of a composition: *aliter* as to a chapel, the origin of which is ascertained.

Alms, collected in chapels as well as in parish churches during the reading of the offertory, are by the direction of the rubric at the disposal of the incumbent of the parish and the churchwardens thereof, and not of the minister or proprietors of the chapel.

PREROGATIVE COURT OF CANTERBURY.

IN THE GOODS OF MARTHA STEADMAN.—p. 59

(*On Motion.*)

An administration *de bonis non*, limited to a certain legacy, granted to the representative of the substituted legatee, without citing the representative of the residuary legatee, resident abroad, but by practice entitled to the general *de bonis* grant; no claim to this legacy having, since the death (in 1797) of the residuary legatee, (also the executor and legatee for life) been made by his representative.

THE deceased died a spinster; and by her will bequeathed a legacy

as follows: "I give to Frances Coventry £300 three per cents. and after her death to Thomas Coventry, and after his decease to Mrs. Margaret Coventry, his sister, for ever." In 1764, Thomas Coventry, sole executor, and residuary legatee (Frances died in the testatrix's lifetime) took probate, and received the dividends upon the above stock till 1797, when he died. The chain of executorship being now broken, and there being no personal representative to Martha Steadman,—

The *King's Advocate* moved for an administration (with the will annexed, of the goods left unadministered by Mr. Coventry) "limited to the sum of £300 three per cents. and the dividends accruing thereon since the death of the executor in 1797," to be granted to Thomas Darby Coventry, the administrator of Margaret, the substituted legatee in the said sum.

Per Curiam.

In order to reduce this sum of stock into possession, it is necessary to have a personal representative to the original testatrix. The person, by practice entitled to the general *de bonis* grant, is the representative of the residuary legatee; but he is abroad, in Italy, and is not expected to return for some years. He has no beneficial interest in the £300. Since the death of Thomas Coventry, (in 1797,) the residuary legatee, the executor, and the legatee for life of this sum, no claim has been asserted on behalf of his representative to this £300, and this non-claim, for so many years, strongly confirms that he has no interest therein. The present claimant is the representative of the substituted legatee, who having survived Mrs. Steadman, took a vested interest. Under these circumstances, I think the Court may safely make the grant, without the formality of citing Thomas Coventry's representative.

Motion granted.

IN THE GOODS OF ANNE MIDDLETON.—p. 60.

On Motion.

Administration *de bonis non*, with a will annexed, granted to a representative interest, entitled to seven twelfths of the residuary estate, without citing those having a direct interest as entitled in distribution.

THE deceased died a widow. By her will she bequeathed the residue of her personal property to her two daughters. One died in the lifetime of the testatrix, who therefore, as to a moiety of the residue, was dead intestate. In November 1823, Mrs. Herbert, the other residuary legatee, took administration with her mother's will annexed; and upon her death, also a widow, her executors, as her representatives in the character of residuary legatee, now applied for an administration *de bonis non* of Anne Middleton.

The property, about £2500, was in a course of administration under the directions of the Court of Chancery; and in addition to the moiety, as residuary legatee under her mother's will, Mrs. Herbert was entitled to one-sixth of the remainder, in distribution under the intestacy. Of the other persons in distribution, there were only two (the rest being

minors, or out of England) to whom administration could be granted, the one entitled to a twelfth; the other, to a fourth of one-twelfth.

Lushington moved for the administration.

Per Curiam.

According to the general practice, a party having a direct interest is preferred, in such a grant, to those entitled in a representative character; but, considering that Mrs. Herbert, at the time of Mrs. Middleton's death, was a next of kin, while the others in distribution were not, and that Mrs. Herbert's representatives are entitled to seven-twelfths of the residuary estate, I think the form of citing those who have a direct interest may be waived, and that the administration *de bonis non* may be granted to Mrs. Herbert's executors.

Motion granted.

HARRIS and WIGGINS v. MILBURN.—p. 62.

On Petition.

An administration (limited to substantiate proceedings in Chancery)—which was decreed, on the next of kin being cited and after due inquiries for a will, and was called in by the executors of a will, not produced till long after—directed to be re-delivered out, and the executors, who might have taken a *cæterorum* probate, condemned in costs.

Addams prayed the Court to direct the limited administration to be re-delivered out, and to condemn the executors in costs.

Phillimore, for the executors. We have a will. The decree taken out by the limited administrator alleged an intestacy. It was not served upon those who have a right to the general grant, which is an invariable practice.

Per Curiam.

In cases of limited administrations, parties entitled to the general grant may take out a *cæterorum* representation. As it was not known that a will was in existence, it was not possible, and therefore not necessary, to cite the executors. Why do they not take out probate? How was the administrator to know there was a will, and that your party were executors?

Phillimore. It appears in the solicitor's letter of September, 1827; at least I infer it from that letter.

JUDGMENT.

SIR JOHN NICHOLL.

The circumstances of this petition are as follow: William Joynson died in March 1827, and left two daughters, both married; he made a will of which he appointed Harris and Wiggins two of the executors, and made his daughters residuary legatees. A suit in chancery by a gentleman, named Barr, against the deceased abated by the death of the testator. From time to time search was made, on the part of Barr, if any will had been proved, or administration taken; but without success; and in October 1827, Milburn, the solicitor of Barr, wrote letters to the husbands of the deceased's daughters, inquiring whether there was any will, or whether they would take out administration, and apprizing them of the necessity of obtaining a personal representative to the de-

ceased's estate. Seven months had then elapsed since the deceased's death: in September, also, Milburn had written to the nephew and to the solicitor of the deceased, making similar inquiries, and informing them of Mr. Barr's intended application to the Court: but to these letters no answers were returned; all possible pains were taken, and in consequence of no answers being returned, and no intelligence of a will being received, a decree with intimation was then extracted, calling upon the daughters to show cause why a limited administration should not be granted to Milburn, the nominee of Barr. Every exertion was made, every possible diligence was used, as appears from the certificate endorsed upon the decree, to serve the decree upon the next of kin; but the husband of one would not permit access to his wife, and would give no information as to the other sister, whose residence could not be discovered. There was, then, a manifest intention to defeat justice. In December 1827, the limited administration was decreed. The proceedings in Chancery were revived; a heavy expense has been incurred; and if the limited administration be now revoked, all those proceedings will be void, and must be commenced *de novo*. In Easter Term 1828, the executors, who at last prove the will, call in this administration. On what ground? Because the decree was not personally served. But they do not deny the receipt of the letters; they do not deny that the husband refused access; they do not deny that the inconveniences, to which I have adverted, will result, and that the proceedings in Chancery must be commenced *de novo*. It is a mere colourable pretext. They were fully aware that a representation was necessary. The death took place nine months before the limited administration was decreed. It was the duty of some of these parties to have taken out probate, or administration, long before that time. This hanging back has much the appearance of fraud, especially under the circumstances. The excuse offered is, that the property is small; but it is not asserted that the executors and the next of kin were not aware of the proceedings in which the representation was necessary: nor do they state any inconvenience which will result from the continuance of the limited administration. The regular course would have been to take probate *cæterorum*, and if there was any fear of collusion, the executors might have intervened in the Chancery suit. However, the usual mode is to take a *cæterorum* grant; but that is not even yet taken out, which, at all events, is great neglect and delay.

The whole bears the appearance of contrivance, and as, I am of opinion, that the limited administration was properly granted, I am bound to direct it to be re-delivered out, and to condemn the executors in costs.

Petition sustained.

RAVENSCROFT v. HUNTER and Others.—p. 65.

On Motion.

Ink alterations in a will being carefully made and not improbably final, the Court will not, on the non-appearance, after personal service, of executors appointed—and of minor legatees materially benefitted—thereby, grant probate, in common form, of the paper as originally executed.

Alterations in ink, (in the margin and body of a duplicate will) carefully made and conformable to long entertained and lately expressed intentions, held to contain the testator's final intentions and entitled to probate.

EDWARD RAVENSCROFT, late of Portland Place, died on the 19th of August, 1828. On the 18th of April, 1825, he executed his will in duplicate, and thereof appointed his wife, Mr. Wilkinson, and Mr. Moore (his solicitor), executors. The two parts of the will were sealed up in separate envelopes; the deceased kept one part; Mr. Moore the other; and in the early part of February, 1828, shortly after the latter's death, his partner, Mr. Lake, sent such duplicate to the testator at his request. In June, the testator observed to Mr. Lake, (as he had before) "that he should soon trouble him to prepare a codicil to his will, or to make an alteration therein." On the 7th of August, the testator was taken ill; on that and the following day he grew worse; a fever which then attacked him, and which was accompanied with frequent aberrations of mind, wholly incapacitated him for business, till he died. At his death was found, locked up in the drawer of his writing table, one part of his will loose and unfolded; and in it were several alterations and marginal notes written by himself. (a) For instance, in the appointment of executors, the name "Daniel Moore" was erased; the names of Henry Lanoy Hunter, and James Rivett Carnac being substituted by an interlineation; so in other parts of the will: and opposite to a bequest in favour of his daughter, Elizabeth Head, "to her separate use, and free from the controul of her husband," the deceased had written in the margin, "Mrs. Head is now a widow, therefore this clause must be modelled accordingly." And in the margin, opposite to the residuary clause, (b) which was crossed out with a pen, were these words: "one of the sons is dead, and the remaining three sons being otherwise provided for, I intend to bequeath one thousand pounds to each of the three sons, and the residue of my fortune not before herein disposed of, to be equally divided between the two daughters of my said late son George Ravenscroft. My meaning is, which I do not think is clearly expressed in this will, that none of these bequests to the three sons and two daughters of my late son George Ravenscroft shall take effect until after the death of my wife Emma Ravenscroft."

Of these five children, the grandsons (one only being of age,) were in the East Indies; the grand-daughters (both minors) were living with and wholly under the care of Mrs. Ravenscroft, the widow of the deceased in this cause. The property consisted entirely of personalty.

A decree had issued, at the instance of Emma Ravenscroft, widow, citing Mr. Hunter, Mr. Carnac, and also the deceased's grand-daughters, "to propound the said will with the alterations made and written in one part thereof, if they or either of them should think it for their, his, or her benefit so to do, otherwise to show cause why probate of the said will as originally executed, and with the residuary clause re-instated, should not be granted to the surviving executors therein named, or one of them."

(a) The duplicate was also found in the same room; but locked up in a drawer under a book case, and with the seal of the original envelope unbroken.

(b) "The residue upon trust to divide the same into sixteen shares and pay the same to the four sons and two daughters of my late son George Ravenscroft; viz. to each of the two daughters, at twenty-one or day of marriage, four sixteenth parts; and to each of the four sons, who shall attain the age of twenty-one, two sixteenth parts, with benefit of survivorship."

This decree was personally served, and no appearance being given, *Lushington* moved for a probate to be granted, in common form, agreeably to the tenor of the decree.

Per Curiam.

I think the executors ought to propound the paper as altered; for the daughters, who are minors, are giving up a great advantage, and may be misled by the process served upon them, and still more by a decree, into a belief that the Court was of opinion the alterations were invalid. Observing then, that the change of the intentions and wishes of the deceased are carefully expressed, and on very reasonable grounds, I cannot feel justified in granting this motion.

An allegation was accordingly given in and admitted, pleading the facts already detailed; and further, in some additional articles, that "in the beginning of July, 1828, the deceased alluding to the appointments he had obtained for his grandsons in India, declared to his sister, 'he had now only to provide for the girls,' thereby meaning his grand-daughters, and the residuary legatees in the will as altered; that he at other times expressed to her an intention of altering his will for the purpose of so benefiting them; saying, 'be easy, be easy, all shall be right.'"

Upon the evidence of these facts, the cause was argued by the *King's Advocate* and *Dodson*, for the will in its altered form; and by *Lushington* and *Addams*, contra.

JUDGMENT.

Sir JOHN NICHOLL.

This case lies within a narrow compass. The deceased died on the 19th of August 1828, having made a will in duplicate on the 18th of April 1825; of which he appointed several executors; among others, Mr. Moore his solicitor. He left the residue to his wife for life, and after her death to his six grandchildren, (the four sons and two daughters of a deceased son,) but in different proportions; for to each of the daughters he gave four-sixteenths, and to each of the sons two-sixteenths. One grandson was dead, and the three others were sent out to India with appointments. Mr. Moore was dead. The deceased's daughter was become a widow. After these events, the deceased sent for the duplicate left at his solicitor's, and with his own hand in one duplicate, erased the name of Mr. Moore, and, in that respect, corrected the paper in several places; he noticed in the margin his daughter's widowhood, and also in the margin wrote a different disposition which he wished to make of the residue.

From what appears on the face of the will, at the time of the deceased's death, and from its being found in the drawer of his ordinary writing table in his study, and the other part in a drawer of his book-case, there is reason to suppose, that the duplicate altered was the one which he got from his solicitor's. The question then is, whether the paper is to take effect with the alterations, or whether these are to be held as mere deliberative memoranda, on which he had not made up his mind, and which therefore are not to operate. From repeated declarations to his solicitor, Lake, it is clear he had long intended some alteration: from conversations with his sister, two or three months before his death, it is equally clear he intended to do something more for his grand-daughters: and in his last conversation with her, on the 29th of July, he talked of it prospectively as a thing to be done, not as then in pro-

gress. He was at that time in remarkably good health, though between seventy and eighty years of age, and was much engaged about the Devonport Dock Water-works, of which company he was chairman. On the 7th of August he was to have gone to the play with his grand-daughters, but was prevented by illness; and, on the 8th, though ill, he was in his usual sitting-room, where the will was found after his decease. On the next day he was so much worse, and so feverish, that he could hardly speak, and he grew worse till his death.

It is pleaded, that these alterations were made before the 7th of August, but there is nothing in the evidence to fix the time. It is clear that on the 29th of July, they were not made. Now, I do not think it at all improbable that the deceased wrote these marginal directions and the alterations in the body, when ill on the 8th, or on the evening before: if so, the completion was prevented by the act of God. Here, then, we have an alteration intended in favour of his grand-daughters: it was long decided on, and meant to be done with his solicitor's assistance; but the delay is pretty satisfactorily accounted for from his being in very good health, and occupied with collateral matters.

What, then, is the construction of the paper itself? The alterations might be in some degree deliberative—as to the form, for the testator might intend to effect his purpose more regularly by a codicil, and through an attorney,—but not as to the disposition, since upon that he had made up his mind, and considered, meant, and thought the paper would operate as now altered: if he had not so thought, he would not have taken so much pains in altering, even to the end, the names of the executors; for that would not have been necessary as mere directions or instructions. On the variations in the benefits it may be inferred that he had definitively resolved; for the changes are written in ink carefully, and not as if on a casual reading over; and the former disposition of the residue is struck through as if meant to be finally altered. He always intended the grand-daughters to have double portions, and he now decided to give them a still larger share, apprehending that the grandsons were provided for, for so he has expressly written, though the extent of that provision does not appear. This departure from the original disposition being then no hasty, transient thought, but long intended, and now thus written, probably as late as the 8th, I am satisfied was his fixed and final intention. Being written on the margin of a formal, executed will, with an alteration not merely directory in the body of it, it bears a very different character from alterations written on a separate loose piece of paper, or in pencil. It is rather to be considered as an act done and intended to take effect, in case, from accident or otherwise, the testator was prevented from having a formal codicil prepared. In this view, coupled also with the probability that it was written on the very day he was taken ill, (the further progress and formal completion of the act being in that case prevented by his increasing illness and by the act of God,) I am of opinion that by pronouncing for the will as altered, that is, that the granddaughters should take the residue with the exception of 1,000*l.* to each of the grandsons, the Court will be giving effect to the real intentions and last will of the deceased, without violating or breaking in upon any established principles that guide this Court.

The parties have altogether conducted the matter very honourably, and with proper delicacy towards the absent grandsons: they have brought

the case fully and fairly before the Court, to whose judgment it was necessarily submitted, and therefore, they are entitled to their costs out of the estate.

TYRELL v. JENNER, and v. T. J. and MARY SPITTY, by their Guardian.—p. 72.

On Motion.

The Court will not, when a competent party is opposing a will, stay the admission of the executors' allegation propounding such will, till the appointment of a committee of a lunatic next of kin be confirmed, more especially such committee being already a party to the suit as curator of other next of kin.

THIS was a cause of proving, in solemn form of law, the last will and testament of the Rev. John Jenner, D. D. late of Billericay, Essex; promoted by Sir John Tyrell, Bart. the sole executor, against John Tyrell Jenner, the only child, and Thomas Jenner Spitty, and Mary Spitty, respectively minors, the grandchildren of the deceased.

An allegation, propounding the will, had been brought in; and, on behalf of the next of kin, *Lushington* now applied that its admission might stand over, under circumstances detailed by the Court.

Per Curiam.

The will, in this case, is propounded by the executor against John Tyrell Jenner, the son of the deceased, and against two grandchildren, by a deceased daughter, who appear by Thomas Spitty their father and guardian. The allegation is dated on the fourth session of last Trinity Term, and an affidavit was then exhibited to the effect, that proceedings had been instituted in Chancery, for the purpose of obtaining a commission of lunacy as to the son, and, on that account, it was prayed that the allegation might stand over. That application was granted, and now a further very long affidavit has been brought in, detailing the proceedings in Chancery, and stating, that Thomas Spitty, though appointed committee, has not yet given security, and that therefore the appointment has not been confirmed; but that is no reason to postpone the admission of this allegation, for there is a party competent to oppose the will, Thomas Spitty—the curator and guardian to the children of a deceased daughter; and it is not necessary to delay the cause till he can appear also in the character of committee of the lunatic. The solicitor supposes, because the Court of Chancery, in arranging trusts, may require all parties interested, and in all characters, to be before it, that the same rule must prevail here; but that is not so. The executor has a right to go on and propound the paper; otherwise his witnesses might die. If there is any risk from a want of appearance on behalf of the lunatic, it is the risk of the executor alone; but this want of appearance is a mere pretext: there are parties competent to oppose, and it so happens that the very same person who is now before the Court, opposing the paper, is the person appointed to be the committee of the lunatic; so that, on the ground of collusion, there cannot by any possibility be an objection to the executors going on.

Experiments of this nature, made on a fancied analogy of the princi-

ples of proceedings in this Court with those of other Courts, must be watched narrowly, as they may lead to a very inconvenient practice. The present affidavit, instead of furnishing grounds for delay, furnishes a reason for allowing the executor to proceed; for in July, it did not appear that Spitty was the committee; but this affidavit proves that his appointment to that office only wants a formal confirmation, and that then he will unite in his own person the double character of committee of the lunatic and curator of the minors; and, in that latter character, as I have already said, he is a party to the cause.

The introduction of the affidavit of the solicitor is so improper, that I shall reserve the question as to the costs of the application, and also as to the propriety of allowing an affidavit, in reply, to be filed.

On the third session the allegation was admitted, unopposed.

MITCHELL v. MITCHELL.—p. 74.

On Admission of an Allegation.

The indorsement "Heads of Will," on a paper fairly written, signed, and dated, lets in parol evidence of intention; but the *prima facie* inference rather is, that such paper was intended to operate, if no more formal instrument were drawn up. An allegation propounding such a paper, with alterations made from time to time, adapting it to the deceased's circumstances and pleading facts inferring adherence, admitted to proof: but, on the parol evidence, the paper pronounced against.

WILLIAM MITCHELL died on the 2nd of September, 1828. After his death was found locked up in a private drawer of his writing desk, a testamentary paper, in his own handwriting, dated the 29th of June, 1821, and near to it a statement of his property as it stood in 1827. On behalf of two of the executors, this testamentary schedule was now propounded, in an allegation, as his last will and testament.

Lushington, in support.

Phillimore, contra.

JUDGMENT.

SIR JOHN NICHOLL.

The real question is, whether the deceased did mean and intend that this paper should operate. It is all fairly written, though there are several alterations made at different times; it is signed and dated by him on the 29th of June 1821, and contains a complete and very natural disposition: for it appears, that he left a wife and six children—all minors; and that his wife had a separate property. (a) If the paper had remained in its original state and without endorsement, it would have been entitled to probate, in common form, on a mere affidavit of handwriting: and parol evidence would not have been admissible. Even though endorsed "Heads for the will of William Mitchell," yet being fairly written, signed, and dated, the *prima facie* inference would rather have been, that he intended it to operate in case no more formal instrument were drawn up, the whole effect of the endorsement, under the authority of the case of *Matthews v. Warner*—a most highly important and highly proper decision—being, that it leaves the case open to the admission

(a) The deceased directed the residue of his property to be equally divided among his children, except that he gave a double share to his eldest son.

of parol evidence. (b) That decision was in conformity with the practice of these Courts in earlier cases, and with the judgments of Sir George Hay, in the case of *Habberfield v. Browning*, 4 Ves. Jun. 200. n., and of Dr. Calvert, in *Cobbold v. Baas*, 4 Ves. Jun. 200. n. The sentences however of the Prerogative Court, in those cases, admitting parol evidence, were, on appeal, both reversed, the delegates holding that the papers, being wills both of real and personal estate, were, *reddendo singula singulis*, perfect dispositions of personalty, and therefore good wills; and that parol evidence was inadmissible. Though the latter case was determined by a commission consisting only of two Common Law Judges and one Civilian, these Courts, in submission to two solemn decisions of the superior Court, felt themselves bound, contrary to their former invariable practice, to reject parol evidence in similar cases. But at length the law was correctly ascertained, and the original doctrine of these Courts was restored, by the conclusion at which the Commission of Review in *Mathews v. Warner* arrived: and in that case it clearly resulted from the parol evidence, that the deceased did not intend the paper to operate. The whole effect then of that case is, that the endorsement opens the paper to a question of intention; and lets in parol evidence.

If Mr. Mitchell had died the day after he wrote this paper, no doubt can be entertained but that it would operate. It appears, however, that, though originally written in 1821, he had from time to time made certain alterations in it, adapting it to the change of his circumstances, particularly on the death of his uncle in 1823: these alterations may possibly operate as so many recognitions, and show that he still acknowledged it in its original character, namely, to operate if he made no more formal will.

In the latter end of March of the present year, it is pleaded, that one of the deceased's brothers consulted with him on making his own will; and the deceased, in the course of a confidential communication with him, entered into the particulars of his will, particularly as to what he had left his wife and as to taking away from her the guardianship of his children. It has been argued that as the clause respecting the guardianship cannot take effect, because the paper is not attested according to the exigencies of the statute, 12 Car. 2. c. 24. s. 8, it must therefore be presumed that the deceased did not consider it as operative: but I do not think that that is necessarily to be inferred; for the law requiring two witnesses to render such an appointment by will effectual, is not by any means so generally known as that which renders essential the formal attestation to a will disposing of realty. On the contrary, this conversation with his brother may be a proof of adherence and of intention that this instrument should operate.

In July the deceased went to Worthing: he was not then in good health; he grew gradually worse, but still he showed no anxiety about his affairs. An inference from this negative conduct might be drawn, that he considered his affairs settled; for, by writing this paper and by the subsequent alterations, having shown a fixed and decided intention to die testate, his silence might furnish an argument that he expected this document would carry his wishes into effect.

Under all these circumstances it is fit that this case should go to proof. Another circumstance now mentioned is, that the freehold estate de-

volved to the house of trade, and that the deceased took it as a tenant in common with the other partners: he possibly then never considered it otherwise than as part of his stock in trade: and though it is true, that for a devise of land in Jamaica the same formalities are required, as in the case of real property in England, yet the deceased may not have regarded this property as subject to such provisions.

The last article had better be reformed, (a) by the insertion of these facts respecting the freehold property; and, on that being done, I shall admit the allegation.

On the fourth Session of Hilary Term, the cause came on for hearing, when the Court was of opinion, that, the evidence bearing rather against the intention that the paper should operate, the Court would not be justified in granting probate; and therefore pronounced that the deceased was dead intestate.

(a) The fifth article, as reformed, pleaded: "that the deceased, at his death, was possessed of a share of a real estate in Jamaica, which share was of the supposed value of 16,000*l.*, and came to the deceased in December, 1826, as a partner in a mercantile firm." It then pleaded the amount of his personal property, stating the share each child respectively would take under the paper propounded and under an intestacy, and that, in either case, the widow would be entitled to nearly the same benefit.

In the Goods of THOMAS DAVIES.—p. 79.

On Motion.

The 38 G. 3. c. 87, only authorizes the grant of a limited administration *durante absentia* of the executor, when there are proceedings depending in Chancery.

THE deceased of his will appointed Joseph Nourse and John Charlton executors, who, on the second of July, 1795, took probate. Nourse survived his co-executor, and upon his death, his sons, Joseph and Henry, proved their father's will, in 1802, as executors thereof. Joseph was since dead and Henry was resident at the Cape of Good Hope, and had no agent in this country. Mr. Davies died possessed of a leasehold house and premises in New Bond Street, held under the mayor, commonalty, and citizens of London for forty-one years, renewable every fourteen; this lease, the only part of his property that remained unadministered, was now renewable, but this renewal could not be effected without a personal representative to him.

Lushington moved for a grant of administration to Topham Davies, (the son, surviving residuary legatee of Thomas, and tenant for life of the house and premises in Bond street) limited to his being made a party to a renewal of the lease from the city of London. He submitted that the case was within the spirit of the 38 Geo. 3. c. 87, by which power was given to the Ecclesiastical Court, (wherever an executor had left the kingdom after he had obtained probate) sufficient to authorize the grant of the present motion.

Per Curiam.

This case is under circumstances of hardship; but how can the Court

grant this application? The executor of the executor is still living at the Cape of Good Hope, it is true; but still he is a full and complete representative. Mr. Simeon's act does not apply to the present case; it applies only when there are proceedings depending in Chancery: but it is to be lamented, that this statute was not made more extensive; for, at present, there certainly is a defect in the law and in the power of these Courts. There is, however, another remedy, viz. a power of attorney from the executor at the Cape. Whenever this Court exercises its discretion in making a grant *durante absentia*, it is on the ground, that there is no legal representative.

I must reject the present application.

Motion refused.

In the Goods of ELIZABETH CROSLY.—p. 80.

On Motion.

Of wills of the same date, that, in the testatrix's possession and to which she last added codicils, is entitled to probate, together with the codicils found therewith, and unrevoked codicils found with the other will.

THE deceased, a widow, died on the 31st of August 1827. On the 25th of September, probate of her will and eight codicils was taken by the executors. The will was dated in 1815, and the codicils at different times between January, 1820, and January, 1826. In April, 1826, a sealed packet, endorsed (but not in her hand-writing) "the will and two codicils of Mrs. E. Crosley," in the care of Messrs. Child and Co. was discovered; it contained a will of the deceased, of the same date as the one proved, and also two codicils, one, dated July, 1816, was annexed to the will by a seal; the other, dated August, 1817, was separate, but enclosed and thus endorsed, "The last and only codicil to my last will." A legacy, in this latter codicil, was repeated in one dated 1820, and of which probate had been taken.

The residuary legatees, in remainder, were minors.

Lushington, upon affidavits, moved the Court for directions in respect to these papers.

Per Curiam.

These two wills were executed on the same day, and attested by the same witnesses; they are both engrossed, and are duplicates with some slight variations: she keeps one by her, and from time to time, adds codicils to it. She says that her will is in an iron casket; and there were found the will, which has been proved, and eight codicils. If any doubt is entertained which is her will, I think this, which was in her own possession and to which she added several codicils some in her own handwriting, must be so considered, but probate must also be taken of the other two codicils, as there is nothing to revoke them.

Probate of codicils decreed.

In the Goods of GEORGE HULME.—p. 82.

On Motion.

Original papers brought into the registry by A.; in a suit between A. and B. as to the will of C., cannot be delivered out to D., on an affidavit of D.'s attorney, that D., as heir at law of C. was in possession of certain premises, and that these papers were muniments of title thereto.

In the Goods of AGNES BLAGRAVE.—p. 83.

On Motion.

Administration to A. granted to the son of B. the brother and sole next of kin; those entitled in distribution to A. and the widow, sole executrix and residuary legatee of B. having renounced.

THE deceased died in June, 1824, a spinster and intestate, leaving John Blagrove her brother and only next of kin, who was also dead; and, of his will, Frances Blagrove, his widow, sole executrix and universal legatee, had taken probate.

A proxy was now exhibited from the widow, and also from the nephews and nieces (children of a deceased brother) of Agnes Blagrove, whereby they severally renounced the administration of her effects.

No administration had yet been taken out.

The *King's Advocate*, referring to the case of "the goods of Mary Keene," 1 Haggard, 692, moved for administration of the effects of Agnes Blagrove to be granted to the son of John and Frances Blagrove.

Per Curiam.

Though the party has not a direct interest, he is acting under a person entitled to a moiety of the property.

Motion granted.

MARSH v. TYRRELL and HARDING.—p. 84.(a)

A feme covert—having, under certain powers, made a will and codicil in February, 1818, (eight months after marriage) by which, after making provision for her husband and leaving sundry legacies, she bequeathed the bulk of her fortune to, and appointed executors, strangers in blood; such disposition (except the provision for the husband) being similar to a will in 1816,—made a will on the 9th of March, 1827, and a codicil thereto on the 21st of April (she dying on the 8th of May) 1827, which papers, except legacies to three servants and rings to three friends, left all her property to her husband, and appointed executors, him and a total stranger: the Court, holding that the latter papers were obtained by the husband's undue influence, when her faculties were much impaired, pronounced for the will and codicil of 1818, and condemned the husband (who though he denied the validity of the powers and nominally prayed an intestacy, was the real party setting up the latter papers) in the costs of the executors of the will of 1818.

Where there is a great change of disposition and a total departure from former testa-

(a) Vide 1 Haggard, 133. [3 Engl. Eccl. Rep. 61.]

mentary intentions long adhered to, it is material to examine the probability of the change, especially, if at the time of making the latter disposition the capacity is doubtful, still more, if the person in whose favour the change is made, possessing great influence and authority, originates and conducts the whole transaction.

A person who can understand and answer, rationally, questions, may still not be capable of making a will for all purposes. The rule of law is, that the competency of the mind must be judged of by the nature of the act to be done, and from a consideration of all the circumstances of the case.

Lushington and *Nicholl*, for Mr. Tyrrell.

Phillimore for Mr. Harding.

The *King's Advocate* and *Addams*, contra.

JUDGMENT.

Sir JOHN NICHOLL.

This cause was very ably and fully argued in the former part of this term, and the material parts of the evidence were then stated and discussed: it is not therefore necessary to recite in detail much of the depositions. The grounds of the decision must be looked for rather in the conduct of the parties and in the documents, than in the oral evidence. The necessary inferences to be drawn from that conduct will afford a solid and safe basis for the judgment of the Court; where the oral evidence harmonizes with those inferences a moral conviction rightly follows, but the depositions, where they are at variance with the conduct of the parties and with the *res gestæ*, are less to be relied upon.

Some parts of this case afford a strong illustration of these remarks, and induce me to consider with more than usual attention the conduct of the several actors in the matters which are the subject of inquiry.

The question arises on the testamentary acts of a married woman; and for the purpose of deciding it the Court must assume that she had a right to make a will, since the consideration of the validity of the deed, under which the power is asserted, belongs to the jurisdiction of another Court.

The alleged testatrix, Mrs. Sophia Harding, wife of John Harding of York Place, Walworth, died on the 8th of May 1827, and left property amounting to 20,000*l.* or 25,000*l.*, exclusive of a sum of 10,000*l.* due to her from the estate of Marsh and Son. Two wills are propounded. The first, dated on the 28th February, 1818, with a codicil of the same date, by Mr. Arthur Cuthbert Marsh, one of the executors and a joint residuary legatee. The other, dated on the 9th of March, 1827, with a codicil of the 21st of April, 1827, by Mr. John Tyrrell, one of the executors. Of this latter will Mr. Harding, the husband, is also an executor, and is a party in the suit; appearing, however, separately, for the purpose of reserving to himself the right of questioning the deeds under which these wills were made: not opposing the *factum* of this latter will, for in truth he is substantially the party setting it up. The real question is, upon the *factum* of this latter will, for to the validity of the former will no serious objection has been, or can be, taken; though some insinuations have been thrown out against the conduct and supposed influence of the parties benefitted under it.

The general substance of the two wills is to the following effect. By the former will, the dividends on 5000*l.* navy five per cents. are given to the husband for life, and then the stock itself is bequeathed to his eldest son. Her leasehold house and furniture at Walworth are given to her husband absolutely, and several remembrances to friends, and

legacies to servants are also bequeathed by it; but the bulk, the residue, is left to the children of Mr. William Marsh, "by Amelia Marsh his first wife, formerly Amelia Cuthbert, deceased." William Marsh, Arthur Cuthbert Marsh, and Richard Creed are appointed executors, and to each of them is given a legacy of 1,000*l.*, "as a compensation for their trouble." It is sufficient at present to state the substance thus generally, though it may be necessary hereafter to examine some of the contents more in detail. Here, then, is a provision for, and benefit to, the husband and to his eldest son, but the principal objects of her bounty are the children of Amelia Marsh, formerly Cuthbert. No other children of William Marsh are mentioned: and the two Messrs. Marsh, and Mr. Creed, are selected as her confidential executors and trustees.

The contents of the latter will, of the 9th of March 1827, are more brief, for by it every thing is left to the husband, Mr. Harding, except legacies to three servants of 300*l.* each; and the codicil on the 21st of April, bequeaths only rings to three ladies, sisters, two of whom were dead; but it contains a clause confirming the will. Here then is a great change of disposition: the character and objects of the former will are totally abandoned.

In inquiring into the factum of the latter will, it becomes material to examine the probability of this great change of intention, and it becomes the more necessary to examine that probability, if at the time of making the disposition, the capacity was in any degree weakened or doubtful; still more if the husband, in whose favour this great change is made, and who from the relation in which he stands to the deceased, must almost necessarily have great influence and authority, should be the person originating and conducting the whole business of the new will. To examine then, the probability of this change, it may be proper to consider the grounds and circumstances of making the first will; if that were made upon hasty, capricious, temporary considerations, the departure from it becomes less improbable; but if made under motives long existing, and quite naturally inducing it, the adherence to it will be the more strongly presumed, and the circumstances to account for the complete revolution in her intentions will be required to be more forcible.

The deceased was, originally, Miss Sophia Smyth, and derived the principal part of her property from a brother, William Smyth, who about the year 1779 was in the East Indies, and succeeded Mr. Cuthbert as naval store-keeper and agent victualler of the fleet in India under Sir Edward Hughes. There is no proof that Smyth acquired that situation through the recommendation of Mr. Marsh, who was navy agent to Mr. Cuthbert; but it is admitted, in Harding's answers to the second article, "that William Smyth may have professed and felt a great regard for Mr. Cuthbert, and he had also a great regard for and confidence in Mr. Marsh, for upon his death in 1784, he by will appointed Mr. Marsh his executor and trustee, and under that will the deceased and her sister, as joint residuary legatees, became entitled to a considerable part of William Smyth's fortune."

In 1785, Mr. Marsh married Miss Amelia Cuthbert, daughter of Mr. Cuthbert, and she died in 1793, leaving four children, two sons and two daughters. Mr. Marsh married again, and had a family by his second wife. After the death of the first wife, Mrs. Amelia Marsh, the friend

of the deceased, it was not likely that any great intimacy would be maintained between the deceased and Mr. Marsh; but there is no appearance of her having at any time withdrawn her confidence in him, still less her regard for the children of his first wife. Messrs. Marsh and Creed continued her agents, and had the management of her property as her friends and the executors of her brother.

In 1813, the deceased's sister, Miss Elizabeth Smyth, died intestate, and her joint share of her brother's fortune devolved upon Miss Sophia Smyth, the testatrix. There is no proof that previous to the death of the sister the deceased had made any will, and probably she had not, as the sister died intestate; but she now was left alone, her father and mother were dead, her sister was dead, and she had no known relation. She was about fifty years of age, past the hopes of having a family of her own; she had a large fortune, and it was not unnatural that she should wish to make a settlement of it. It was not unnatural, it was highly probable, that the children of Mrs. Amelia Marsh, formerly Miss Cuthbert, should be adopted as the principal objects of her bounty; there were no persons presenting themselves likely to stand in competition with them in the deceased's affection and regard. It was not improbable, nor unwise, that she should vest her property in trustees to her separate use, and at her own disposal in case of coverture. She might at her time of life, and with her large fortune, suspect herself, and wish to guard against her own imprudence, lest she should fall a sacrifice to the designs of some artful person, who, for the sake of her fortune, might inveigle her into marriage. She might do this without having any person specially in view, or without being even solicited by any individual; or she might do so, because she was addressed by some particular person, and suspected his motives and designs. Accordingly, in 1816, there were several acts done for the arrangement of her property, vesting it in trustees for her separate use, and making a disposition of it by will, which, being revocable, she might at all times alter upon any change of circumstances.

By the deed of the 20th of February, 1816, recited in a subsequent deed, 10,000*l.* were left in Marsh's hands as executor of William Smyth, to answer all outstanding demands on Marsh in that character. The rest of the property was invested in the funds. This was no extraordinary security, considering that William Smyth was a public accountant, having been naval store-keeper and agent victualler to the fleet in the East Indies. In such transactions, in a distant part of the globe, it is hardly possible to say when the representatives of public accountants are quite safe from demands; but, in the present arrangement, there was nothing particularly advantageous beyond mere indemnity, for the principal was to remain for ten years, and then it, or what then remained of it, was to be transferred to Miss Smyth or her representatives, and in the mean time interest at four per cent. was to be paid to her: which, considering the war was over, and there was a prospect of a very permanent and firm peace, was a fair interest and not disadvantageous to Miss Smyth; for the credit of Mr. Marsh, at that time, stood quite unsuspected.

On the 8th of March, 1816, all the other property of the deceased, both as surviving residuary legatee of her brother and as administratrix and sole next of kin of her sister, having been invested in the public funds in the joint names of William Marsh, Arthur Cuthbert Marsh,

and Richard Creed, a deed or declaration of trust was executed, by which this funded property was held in trust to the separate use of Miss Sophia Smyth, subject to her disposal by will at her death, notwithstanding any future coverture, and as if she continued a feme sole; "independently of any husband, who is not to intermeddle therewith, nor is the property, or the dividends, to be liable to his control, debts, or interference." The 10,000*l.* at the end of ten years, were to be invested in the like trusts, with an additional power of disposal by deed in her lifetime. If Miss Sophia Smyth made no disposition of the property, either by deed or will, it was to go according to the statute of distributions, as if she had died intestate and unmarried. This is the substance of the deed of the 8th of March, 1816.

On the 12th of March, 1816, she executed a further deed, irrevocably giving the 10,000*l.* at her death, to Mr. Marsh; but there was perhaps nothing very extraordinary or improvident in this gift. He had had the whole trouble of winding up and managing the concerns of her brother, her sister, and herself; he was to have the additional trouble of this trust; he was married again, and had a second family: her fortune still remaining at her own disposal was ample. It was not astonishing that she should consider it but a reasonable remuneration to Mr. Marsh to secure to him this 10,000*l.* at her death, reserving the interest of it for her life.

Shortly after this she made her will, which probably was in preparation at the time the deed of gift was executed. This will was executed on the 23d March 1816, and its contents are material. It directs, that she shall be buried at Highgate, in the vault with her sister. It appoints as her three executors and trustees, William Marsh, Arthur Cuthbert Marsh, and Richard Creed, and leaves them as a compensation for their trouble 1,000*l.* each. To Edward Rigden, if in her service at her death, it gives 500*l.*; if not, 200*l.*: to Mary Apostles, if in her service, the same; if not, 100*l.*; also her wearing apparel, and 2*s.* 6*d.* a week to take care of her dog: to Mary George, the cook, if in her service, 50*l.* and to the coachman 20*l.*, and her carriage, harness, and horses. Rigden and Apostles are to live in her house for three months, and to be paid a guinea a week as board wages; and her wines and liquors are to be divided equally between them. These are the provisions for the servants, and she then proceeds to give remembrances to her friends. To Charlotte Hillyer is left a diamond ring with her late sister's hair; to Sybilla and Sarah Hillyer, each diamond ear-rings: to the three Misses Binstead, an annuity of 100*l.* with benefit of survivorship: to Mrs. Isherwood, for a ring, 20*l.*: to Mrs. Rogers, for a ring, 21*l.*: to Mr. Creed, her house and furniture at Walworth, but with a stipulation that there shall be no auction on the premises. It is her "express wish" that the family paintings should be burnt, or otherwise destroyed. The miniatures of her brother and sister are to be put in her coffin and interred with her remains. The residue of her property is given to the children of William Marsh, by Amelia Marsh, his first wife, formerly Amelia Cuthbert, spinster, deceased, to be divided equally between them; and if only one of them be living at her death, then to that one.

This will has features strongly marking the mind, character, and testamentary intentions of the testatrix; here are friends recollected with tokens of remembrance, some with pecuniary benefits: here are old servants provided for according to their stations and length of service: here

is her confidence continued to her brother's executors—Messrs. Marsh and Creed—one of the former, the husband of her late friend Mrs. Amelia Marsh: but the great objects of her bounty are the children of that friend Mrs. Amelia Marsh; to these the bulk of her fortune is given in exclusion of Mr. Marsh's family by a second wife. On the 26th of March 1816, she made a codicil, merely giving an additional 50*l.* to her servant Rigden, and 100*l.* to her solicitor, Martelli. It is observable, that in this will no notice whatever is taken of Mr. Harding: and although, in three months afterwards, he procured a marriage licence, yet there is no proof that she acknowledged him as a friend when this will was made, still less that he at that time, nor in the month of June, was received as an accepted lover, nor that the marriage was delayed by her ill health. If she was in ill health, it is more probable that she should make her will while she remained a spinster, than enter into a matrimonial engagement.

A twelvemonth afterwards, however, she did accept and marry Mr. Harding; but not with any peculiar marks of confidence or affection; for, a few days only before the marriage, she executed another deed of trust settling the house and furniture, and some other property at Walworth, to her own separate use; in the same manner as she had the year before settled the funded property. Whether this deed, executed just before marriage, is or is not valid, may depend upon circumstances: but the fact is, that the other deed of March 1816, is furnished by Harding himself, as the foundation of the will made by his own solicitor in his favour; and is pleaded by Mr. John Tyrrell—Harding's co-executor, so nominated by Harding himself—and who, it is apparent, merely lends his name in this cause. Thus then Mr. Tyrrell, though he does not admit the validity of the deed of June 1817, sets up the validity of the deed of 1816, as the very groundwork of the will which he propounds; but Mr. Harding, though obtaining, and sworn executor to, that will, now denies the validity of both deeds and all wills made under them. That is the shape the case assumes.

In June, 1817, Harding became the husband of the deceased, he being about sixty-three years of age, with a family by a former wife; she a spinster about fifty-one. On the 28th of February, 1818, about eight months after the marriage, the deceased made a new will, the will propounded by Mr. Arthur Cuthbert Marsh. It was very natural and proper that she should now make a provision out of her ample fortune for the husband, to whom she had united herself. It was not made in the first moon; eight months had elapsed since the marriage; she could therefore form a fair estimate of his qualities, his society, his real affection, and his just claims. She accordingly applied to Mr. Delmar, the successor of Mr. Martelli, who had prepared the former will of 1816, but who had since died; and there is not the least ground to suspect that this was not her own free, voluntary, uninfluenced act. Mr. Delmar's account of her first visit is as follows:—

“On the 21st of February, 1818, (deposing from his books) the deceased called upon him in Norfolk street; she came in her carriage, and was introduced to deponent by a clerk who had been many years with Mr. Martelli: she told deponent, ‘she wished to make an alteration in her will:’ deponent referred to her papers, and took out the draft of the former will: he went through it, item by item, with the deceased: she specified the alterations she wished, and deponent noted most of them in the margin. He afterwards directed a clerk to copy the draft embo-

dying the pencil alterations; deponent revised the same, and after the draft had been settled by a conveyancer, deponent had two copies made ready for execution. On the 28th of February (again deposing from his books) deceased called again upon the deponent, when he read over, or explained the contents of, one of the duplicate copies of the will, item by item, to the deceased, and she signified her approbation, as he proceeded,—but he does not remember in what terms.”

The will being thus executed in duplicate, each part was sealed up and indorsed; one part was deposited at the office of her agents and trustees, Messrs. Marsh, in a box, in which her other deeds and papers were deposited, and in which it was found at her death: and the indorsement on the envelope expressly states, “Duplicates in Mrs. Harding’s possession.” In conformity with this, the other packet was delivered to herself, was retained by her for several years, was then delivered for safe custody to her confidential servant, Mary Apostles, since dead, who delivered it over, shortly before her death, to a friend of hers, Mr. Easton, in whose custody it remained, unopened, till after the commencement of the present suit.

Such being the history of the will propounded by Mr. Arthur Cuthbert Marsh, in the making of which, there is not the slightest appearance of Mr. Marsh’s interference, or even of his being privy to its contents, it becomes material to consider what alterations were by it made in the will of 1816. There is a provision made for the husband, 5000*l.* navy five per cents., part of the trust stock, are bequeathed to him for life, and then to his eldest son. The house, furniture, plate, &c. at Walworth, before given to Mr. Creed, are now given to Mr. Harding; there is a trinket given to his eldest son’s wife; the other trinkets are given as before, and the rest of her trinkets to the eldest Miss Marsh: but all the peculiar features of the will remain; she is to be buried at Highgate with her sister; memorials are given to various friends, legacies to servants, an annuity of 100*l.* to the three Misses Binstead, and to the survivor; the pictures are to be destroyed; the miniatures to be buried with her; all is nearly verbatim as in the former will; but, above all, the same confidence is given to her executors, with the same legacy for their trouble; her husband is not even one of her executors; and, what is still more important, the bulk of her fortune is still given to the children of Mrs. Amelia Marsh.

Looking then to the considerations on which this disposition was originally made; looking to the change which had taken place by the marriage, the estimate of, and provision for, it, thus fixed; looking to the full confirmation thus given, after an interval of two years, and after the intervening marriage, even to the peculiarities of the will and to all the testamentary intentions of the deceased, it is difficult to suppose a case, in which adherence to the disposition is more strongly to be inferred and presumed.

The next subjects for consideration and examination are the circumstances, subsequent to this will of 1818, either inferring the continued adherence to the will, or departure from it.

To show adherence, in the first place there is time. No testamentary act is suggested to have been done for nine years, till Harding’s will of March, 1827, which was set about the latter end of February, 1827: but there are intermediate circumstances in aid of the proof of adherence. In 1823, the deceased had a severe paralytic attack, which caused a state of great bodily infirmity, whatever might be its effect upon her mind.

It was natural that such an event should have induced the deceased to have made an alteration in her will, if she were dissatisfied with the existing disposition. Six years of matrimonial cohabitation had taken place: if it had produced this "growing affection and confidence," so much relied on by Mr. Harding's counsel, she would not have remained in that deplorable state without expressing some wish, or taking some measures, to increase the benefit to the husband; but nothing was done in consequence of that attack.

In 1824, Mr. Marsh's misfortunes took place; in September of that year he became a bankrupt; from what circumstances does not appear in the evidence. His bankruptcy did not induce her to alter her will; not even to substitute a different executor. Some communication with Mr. Delmar took place, as to whether it might not be necessary to make a slight alteration, not hostile to Mr. Marsh, but to secure the benefit to him in exclusion of his creditors: but that was not done, and on Marsh's obtaining his certificate in November, 1825, it became unnecessary. This cannot infer departure from the disposition of 1818. There is no reproach expressed with regard to Mr. Marsh: the evidence is all the other way: it is pity and compassion for his misfortunes which she evinces. She does not take the management of her concerns out of his hands: the Messrs. Marsh are continued as her agents—that is a fact not disputed in the evidence—indeed the navy agency house was not bankrupt at that time, and did not become so till within a few days of her death. There is not only the simple fact, that she did not take away her agency from them, but that fact has much increased force when it is admitted, that the husband recommended and pressed her to take her concerns out of the hands of the Messrs. Marsh. This is admitted and justified: but it is proved that very urgent and harsh means were used to induce such a measure; and if the advice were justifiable, the urgency might not be so. Yet notwithstanding all the advice, whether properly or improperly administered, notwithstanding all the supposed increase of affection, and this marital influence and authority, the act is not done; the influence is resisted above two years, till this new will is obtained; and yet if it were her wish, what would have been more easy and practicable? Where were the risk and danger, she living at this time under the protection of her husband—he constantly with her? It is unnecessary to rely minutely upon the evidence of the servants who are releasing witnesses—the fact speaks for itself, and their evidence is in accordance with the fact, and it is confirmed by another witness (who is entitled to full credit), Mr. Delmar, and who speaks to circumstances strongly corroborative; some of which will be presently stated. It is further confirmed by another part of the case. In answer to Marsh's allegation, which sets forth matters inferring adherence to this will, a responsive allegation was given, which consisted of above twenty articles: to above half of those articles not a witness is examined. Most important would it have been to have produced something demonstrating dissatisfaction at the former will; some intention of altering it, and making a new one; but there is not a circumstance of the sort: not a single declaration of that tendency.

Two servants, and a woman who was principally employed in the garden, are brought up all the way out of Devonshire to prove, that, in 1822, the deceased and her husband appeared to be living on kind and conjugal terms together. A few ladies, who made occasional calls at

Walworth, are produced to prove, that Harding was outwardly attentive to his wife, and never ill-used her in their presence; and some of these say, that "in their opinion, the deceased had a testamentary capacity." But in this mass of responsive evidence, which was to support the *condidit* and *factum* of the last will, there is not a single circumstance, coming from the deceased herself, showing dissatisfaction at the former disposition, or the intention to make a new will. There is a total absence of any such supplementary evidence, important as it would have been to lead up to the *factum* of this new will.

The evidence as to adherence and departure, as well as the inferences and presumptions, are all on one side. Nay, the only circumstance relied upon, the bankruptcy of Marsh, instead of affording a probable ground for this altered disposition, operates on my mind in the contrary direction. What could afford a stronger reason for her adhering to her former intentions of giving the bulk of her fortune to the children of Mrs. Amelia Marsh, two sons and two daughters, than the misfortunes of their father, now a bankrupt, with another family to provide for? But, further, why should Marsh's bankruptcy induce her to depart from all the characteristic peculiarities of this will? the place of her interment; the memorials to her friends; the burning of these pictures, and the placing of these miniatures in her coffin: for the change is total and complete. Looking then at the circumstances which preceded the first will, and those which intervened between February 1818 and February 1827, nothing can in my judgment be more improbable than the disposition contained in the will propounded by Mr. Tyrrell.

With this foundation of improbability, the next inquiry is, whether there are not circumstances leading to a strong suspicion that this will was obtained by the husband through undue influence, and circumvention, exercised over a testatrix incapable of protecting herself, and of resisting his marital authority. Mr. Harding's object and motives in marrying this lady can only with certainty be known to himself; but circumstances may afford some inferences. He suggests that he was not aware how her property was settled, till after Marsh's bankruptcy. Some facts however render it difficult to suppose that to be true, and that he was not apprised of it at the time of, and before, the marriage. Did he marry this lady supposing that her property was not vested in trustees to her separate use, and that by marriage he at once acquired the right to it? How came it then that no settlement was made on the marriage? Had she no sense? no friends? And had he no honesty, so as to make a settlement out of this large fortune, if he supposed that by marriage he became entitled to it? How came it that from the first moment after the marriage he never interfered, in the slightest degree, in the appropriation or management of the property? With every allowance for his disinterested liberality, it is hardly credible that in seven years he never should have interfered. He must therefore have been at all times fully aware, as his conduct proves, that her property was settled to her separate use. Here are also these facts leading to the same conclusion.

Harding produced a copy of the deed of trust, of 1816, to enable Tyrrell to draw the will of 1827. Shortly after Marsh's bankruptcy, he went to Delmar and told him, "that he came from Mrs. Harding, who wished to have her settlements and will sent to her." Delmar went there shortly after, taking the drafts of these papers with him, not hav-

ing the originals, for they were in the box at Marsh's office: but Harding then told him "that he had copies:" that is, copies of the settlements: for his own case is, that he did not know the contents of the will of 1818 to the last. How and when, then, came he by these copies? It is true indeed that Delmar says, "he believes, that, about that time, Harding received from the deceased a copy of the settlement of the 8th of March, 1816:" but that is contrary to the whole of her conduct; for she was, at that time and at all times, most anxious to keep him ignorant of her concerns of every sort. But there is another circumstance that renders it not improbable, that he had these very copies communicated and delivered to him before the marriage, as in common fairness they ought to have been, and as his conduct, in never attempting to interfere in the management of this property, strongly infers; that circumstance is, that the very copy of which Harding was in possession, was a copy certified by two of Martelli's clerks in 1816. This copy was then in existence before the marriage, and the whole conduct of the parties renders it by no means improbable that he was in possession of it at that time.

It is true, that, if he then knew of these instruments, he may appear the more disinterested in marrying the deceased without any settlement being made of some part of the property in his favour. It may be so: but an artful, cunning, experienced man might feel some confidence, that, when married, he should have sufficient influence to persuade his wife to appoint and dispose of the property in his favour. If he had such a design and such a hope he would probably adopt two modes of effecting his purpose: first, by wheedling and coaxing to get her affairs and confidence into his power; and next, if those failed, by importunity and rigour to subdue her into acquiescence and submission. The two modes are by no means inconsistent with each other.

The letters of Mr. Harding to his wife have been exhibited by Mr. Tyrrell, and they are rather of an extraordinary tone, considering the ages of the parties: they display something of a character and plan not irreconcilable with the design just suggested. Mr. Harding had a cottage in Devonshire, and was engaged in manganese works, from which, as he represents, he was deriving considerable profit—about 1,000*l.* a year: he goes down to this cottage soon after the marriage—the first month is scarcely over, and he is absent from his bride about two months. These are passages in his letters. The first is dated July 1817, he having been married in the June preceding. After giving an account of his journey into Devonshire, he writes, "I have air and exercise in abundance, but I sigh that you do not partake of both with me; for happy should I have been to have had my dear, my beloved wife with me; but to this our separation I must be reconciled, knowing it to be necessary and not of long duration; but in my fond imagination you are and ever will be present, for while I live my bosom will ever glow with warm affection, and with the purest regard for you, and with these sentiments do I now subscribe myself, my dearest Sophia, most tenderly and most affectionately yours."

The next is from Ilfracome, and is dated on the 25th of July. "Thus, my beloved Sophia, I am separated from you by necessity, or by a sort of destiny not to be commanded or controlled. My heart is yours, and in mind and thought you are ever present; for you my fond imagination is my present comfort, and my only bliss. Yes, my dearest

Sophia, be assured I am with affectionate regard and the most tender love truly and affectionately yours."

The third is on the 11th of August: that concludes: "I greatly regret that my absence from you is so long, but I shall not stay one hour more than is absolutely necessary. To me this separation is more than painful, for not a day or hour passes but I think of my much loved Sophia, my beloved wife: for be assured I am most faithfully and most affectionately yours."

The next is dated on the 3d of September, from Manchester: "Do write to me, and let me hear from you; that will be the highest pleasure I can now receive. I trust in Heaven, that a few days more will dismiss me from this wretched place, and enable me soon to embrace my much loved wife, who has my warmest affection, my highest regard, and the tender love of him, who is, my beloved Sophia, your J. Harding."

The letter of the 15th of September, thus concludes: "Oh! how I anticipate the joy I shall experience on seeing you. Yes, my Sophia, this thought throws a glow of happiness over my whole frame, and makes me feel that I am wholly and truly yours."

The next is much in the same tone. "I know not how to express to you the pleasure I felt on reading your last letter: it was the language of an affectionate wife; it was the harbinger of my future happiness, for nothing on earth can be more pleasant to me than your presence. Yes, my dearest Sophia, my greatest wish is, and always will be, to be inseparable and ever near you. My heart glows with a warm affection for you, and I love you with tenderness and with truth."

These are passages from some of the letters written at this period of time. Why, the very heyday of life, the most ardent affections of youth, could not have dictated warmer effusions: they have more the appearance of being written with a view of wheedling her out of her large fortune, at her own disposal, than of being the expression of the real genuine feelings of a husband of sixty-four, to a second wife of fifty-one. This last letter is dated on the 12th of April 1818, shortly after she had been making the will now propounded by Mr. Marsh. Her answers are not produced, and if they contained expressions of equal warmth they might have shown something of this "growing affection:" they may have been rather cold replies; she may have seen through, or thought she saw through, these high-flown effusions, and suspected that they had her property rather than her person in view. None of her letters are exhibited till after her paralytic attack,—the first is dated in May 1825, when she was no longer able to write herself: they are in the handwriting of her servant, Mary Apostles: they are dry and formal, possibly on that account: but it is not wholly unworthy of remark, that, though written after Marsh's bankruptcy, they contain no expression of dissatisfaction towards the Messrs. Marsh, nor the least allusion to her accounts with them; still less a wish or suggestion of any new testamentary act.

That Harding advised her to take her concerns out of Marsh's hands is admitted: that she refused to do so is demonstrated by the fact; but it is important to inquire, whether he did not then resort to rough means. That he did so is proved by the servants, who though releasing, are not discredited witnesses. It is not necessary to advert to the particulars of their depositions; they were fully pointed out in the argument: nor

even if their evidence is biassed and high coloured, would it be material, for it is not necessary to rely on them alone, nor on the exact details of their testimony: for sufficient is stated by Mr. Delmar in confirmation of them; and I see nothing to impeach his credit.

That Harding endeavoured to get at the original deeds and will, is proved by Delmar. Delmar carried copies, but Harding then said, "he had copies, he did not want copies." But there is this strong mark of falsehood; he pretended that he had applied to Delmar by the deceased's desire, but when the three parties are together, he does not venture to appeal to her in the presence of Delmar to confirm the truth of his mission; he does not venture to say—"Now, Madam, here is Mr. Delmar, deliver your message to him yourself; I will leave the room; he is your confidential solicitor, he prepared your will in my absence, tell him what your real wishes are; he may suspect that I have some selfish object in view." It is quite incredible that she had any wish of the kind. The *res gestæ* and the evidence of the witnesses concur to prove, that she was most anxious no paper of hers should be given up to Harding, and that no account of hers should be rendered to him.

What is the substance of Mr. Delmar's account? "Mostly, when he called, Harding seemed to make a point of being present and was painfully intrusive; he constantly kept speaking of Mr. Marsh and his son, in a way tending to excite an unfavourable impression of them; the conversation always took that turn; he uniformly manifested a wish to pry into her pecuniary affairs, even at times when she was evidently very ill; his object seemed to be to wean the deceased's regard from Marsh and his family. The deceased for the most part sat silent, but at times, when he urged the subject more closely, she used to manifest patience, saying 'No, no,' to avoid the subject: the very mention of such matters seemed to give the deceased pain, but Harding's conversation was nevertheless always about them. Deponent's visits were continued principally because they seemed to soothe her, and operated as a check on the irritation Harding's conduct excited: . . . Harding was constantly alluding to the subject, and there was an unhappy state of discord on that account. He used great harshness of expression towards the deceased on that subject, and at a time when from ill health she required every tenderness. On several of his visits, deponent found her in tears; he sometimes observed to Harding, that the deceased was in that delicate state it was very necessary to treat her with kindness. She appeared to grow gradually weaker."

This is the general substance of Delmar's evidence, and it is in perfect accordance with, though not quite so strong as, the evidence of some of the servants. It needs no comment.

There is another fact not only inferring, but nearly conclusive upon the absence of all previous intention of the deceased to make a new will. She had a duplicate of the will of 1818, as I have said, in her possession; but fearful of its falling into the hands of her husband, she delivered it to her confidential servant, Mary Apostles, in the presence of Rigden; and Apostles, when in a dangerous state, delivered it to her friend Easton; and in his hands it remained till some time after her death. Now Harding had been applying to Delmar, as from the deceased, for her will: supposing that to be true, and that Delmar had declined to deliver it, yet she had the duplicate within her power. If she had wished to revoke that will, would she not have communicated the fact of her

possession of this duplicate to her husband, unless indeed her capacity was so gone that she had no recollection of its existence? But if she wished the will to be revoked, and recollected the existence of that duplicate, it is quite incredible that she would not have apprised her husband of it, and would not have required Rigden and Apostles to deliver it up; and yet it is Harding's own case that he did not know the contents of the will, nor the existence of this duplicate till after her death. How fully, then, do the facts and the conduct confirm the parol evidence, that Harding was anxious to possess himself of the will, and the property of the deceased, and that she was no less anxious to keep both her property and her will out of his hands.

Such being the circumstances of the case, up to the very commencement of the transaction of Harding's getting this will made, it becomes essential to inquire what was the state of the deceased's capacity at this period. -This part of the case, again, lies within a narrow compass, and is established by the conduct of Harding and his own witnesses: it does not require to be closely examined upon the opinions of witnesses, which are generally conflicting upon the subject of capacity.

The deceased had a paralytic attack in 1823, which reduced her to great bodily infirmity; but, whether she had another in 1825, or whether she was in a state of despondency, and made an attempt upon her own life is not material; she certainly had a good deal to prey on her mind and spirits: the misfortunes of Mr. Marsh, the "worritting" of her husband, and subsequently, the illness of her confidential old servant, Apostles, were not likely to be without their effect upon a nervous patient. It is admitted, that Mr. Delmar had intimated an opinion, that she was incapable of managing her own concerns; it is admitted that an operation on her maid, Apostles, was wished to be postponed lest it should agitate her too much, and render her unfit for making this will: it is admitted that, before the drawer of this will would undertake to attend for the purpose of receiving her instructions, he wished her to be visited and examined by medical gentlemen, to ascertain the state of her capacity: it is admitted, that the opinion of a surgeon, the drawer's brother, was not alone deemed sufficient; was not alone deemed satisfactory: it is admitted that Dr. Burrows, a medical person, supposed to be particularly conversant with defects of the mind—at least in cases of derangement—after sitting with her for three quarters of an hour, would only give a limited opinion as to her capacity, and wished for a second interview before he gave a decided opinion. In such a case, to resort to the judgment of persons who occasionally, or of others who frequently, saw her, whether she was quite capable or quite imbecile, would be utterly useless: she was at all events in a state of very weakened and doubtful capacity.

If then, in addition to these circumstances; first, that the disposition in the new will is highly improbable; next, that the husband had been endeavouring to get at her deeds and testamentary instruments; and further, that she was in this state of doubtful capacity; if in addition to all this, we yet find that the husband, as far as the evidence goes, originates and conducts the whole business, representing or rather misrepresenting the previous facts, and being present at all the material parts of the transaction, the case proceeds to the evidence of the *factum* under presumptions of fraud and imposition, which hardly any evidence would be sufficient to repel. It would at least be extremely difficult to show that she was a free as well as capable testatrix; to show that she had a real

disposing testamentary mind, and an intention to abandon all the dispositions of her former will made so carefully, and adhered to so firmly. The strong presumption would be that, in whatever she said and did, however it might impose upon the witnesses, she was a mere instrument and puppet in the hands of her husband.

We come then now to the evidence on the *condidit*.

The witnesses to the *factum* are three. Mr. Edward Tyrrell, a solicitor, and deputy-remembrancer of the city of London; Mr. Frederick Tyrrell, a surgeon, his brother; and Dr. Burrows, a physician. Certainly three persons, respectable in situation, of unimpeached general character, and competent to arrive at a fair opinion, as far as their opportunities and the means they used of judging, enabled them to form an estimate of her mental capacity. There is no reason whatever to suppose, that they would either enter into a fraudulent conspiracy with the husband to obtain this will, or that they would have come forward to support it by wilful perjury; nothing of the sort can possibly be imputed to them: but it is necessary to see under what prepossessions they engaged in the matter, in order to form a correct judgment of the inquiries which they made, and of the conclusions at which they arrive. They may have been imposed upon and duped by the artful misrepresentations of Mr. Harding: they may have suffered their vigilance to be lulled, and their penetration to have slept, and after having embarked in the transaction, and after their characters were in some measure implicated, they may be under a strong bias to support and give effect to the act. Under that bias very honest persons (such is the infirmity of our nature) often deceive themselves without being aware of it: they fancy impressions to have existed, nay they sometimes even suppose facts to have taken place, because those impressions now exist, or because those facts might or ought to have passed, in order to support their impressions. Hence this strong bias will often give a false colour to a transaction, without the witness intending to speak falsely or to suppress the truth. Without, therefore, in the slightest degree suspecting any thing of conspiracy or wilful misrepresentation, on the part of these gentlemen, it may be necessary to examine their evidence upon those other principles which have been just stated; for it was correctly said by the leading counsel for Mr. Tyrrell, and it cannot be expressed in better words, (if I have taken them accurately) "even persons of high character may fail to do their duty when nearly connected." This he applied to the evidence of Mr. Delmar.

The principal witness, and he who begins the history, is Mr. Edward Tyrrell, the solicitor who prepared the will: he states, "He and his family for two generations have been intimately acquainted with Mr. Harding; he had a slight knowledge of the deceased." He then was the intimate friend, and he was also the solicitor of Mr. Harding, but not the solicitor of the deceased. He goes on: "On or about the 19th or 20th of February, 1827, Mr. Harding called on deponent at his office, and informed him, that Mrs. Harding wished to see him for the purpose of making her will, and for him to act as her solicitor. Mr. Harding said, that his wife had since her marriage made a will without his knowledge, and that it was either in the hands of Mr. Delmar, or Mr. Marsh, the navy agent; that his wife, and he, at her request, had applied to them both for the will, and also to Mr. Marsh for her, the deceased's, account as her agent: he further stated that Mr. Delmar had called upon the deceased a few weeks back, and that on his, Delmar's, leaving the room,

Mrs. Harding became agitated, and burst into tears, upon which Mr. Delmar turned round, and asked, whether he thought the deceased in a fit state to manage her affairs, to which he, Harding, replied, 'that he certainly did think her quite capable.' After this statement Mr. Harding handed to deponent an attested copy of a deed of gift, dated antecedent to deceased's marriage, whereby she had assigned £10,000 to the elder Mr. Marsh: also a like copy of the deed of settlement which she made of the greater part of her property, shortly before her marriage; which settlement reserved to the deceased the right of disposal by will of the property therein mentioned. Deponent, referring himself to what Mr. Harding had let drop, as to Mr. Delmar's doubts about Mr. Harding's capacity for the management of her affairs, told Mr. Harding 'that he, deponent, should not feel himself justified in taking instructions for a will from Mrs. Harding, until some medical person of respectability had seen her, and given an opinion as to her state of mind.' Mr. Harding having concurred with deponent in respect of such a caution, deponent, with the like concurrence, applied to his brother, Mr. Frederick Tyrrell, requesting him to call upon the deceased for the purpose of ascertaining her state of mind, which he promised to do."

Upon this account of the commencement of the business, several observations occur. First, the matter, as far as here appears, originates entirely with Mr. Harding: there is no note from the deceased, no servant, nor disinterested messenger sent by her: Harding goes himself to his own friend and solicitor; and it is Harding's own story "that Mrs. Harding wished to see Tyrrell;" but of the reality of that wish, there is not a tittle of evidence, and from the circumstances already adverted to, there is every reason to suspect that it was misrepresentation. "He told him the will was in the hands of Delmar or Marsh, that his wife, and he, at her request, had applied to Delmar and to Marsh for the will." This, again, is false; the deceased never did apply to Marsh or to Delmar for her will; but Harding applied to Delmar as from the deceased, when Delmar told him, "that the will was at Marsh's office:" and though Delmar afterwards attended the deceased in Harding's presence, yet the will was never mentioned by, nor even in the presence of, the deceased to Delmar. It is clear also that Harding was not aware the deceased either then had, or ever had, a duplicate in her own possession, of which she must have apprized him had she wished to revoke it. By this misrepresentation then, "that the deceased wished to revoke her will, that it was in the hands of Delmar or Marsh, that the deceased herself, and he, at her request, had applied to each of them for the will without success;" is Mr. Edward Tyrrell imposed upon, and induced to engage in making this new will. This is the very origin and foundation of the whole sequel. Upon this false basis, originating entirely with Harding, the subsequent transactions are all built. There is no reason to suppose that Tyrrell did not fairly embark in the business under the impression, that he was going to carry into effect the real wishes of a free and capable testatrix. Upon the former point, her free agency, with a little more penetration, Mr. Tyrrell ought perhaps to have taken some alarm, when he saw by this settlement, that the wife had in her own power the disposal of a very large property, and that the channel of communication was her husband. Upon the latter point, the capacity, when told that Delmar had insinuated her incompetency, he did take the precaution of desiring that medical persons should first

see the deceased; but all his precautions were directed to ascertain, whether she was fit to make a will, which she really desired and wished to make. Upon the other point, by far the most important, whether in this questionable state as to capacity, she was or was not under the influence and dominion of her interested husband, no precautionary inquiry whatever took place; and this course was pursued throughout the whole business, and by all the witnesses.

Edward Tyrrell applied to his brother Frederick, one of the surgeons of St. Thomas' Hospital, and (upon the authority of the husband) he conveyed to him the same impression, "that the deceased was desirous of making a will in favour of her husband, but that some doubts had been raised by Marsh, or by some one on his behalf, respecting the deceased's fitness for the performance of such an act." This is stated by Mr. Frederick Tyrrell in answer to the 6th interrogatory. So that Edward Tyrrell not only received himself, but conveyed the same false impression, from the misrepresentations of Harding, that the deceased really wished to make a will in favour of her husband, but that Marsh or some one was raising doubts in order to obstruct it. He also mentions, "that he has a notion, that before his first visit to the deceased, he saw Mr. Harding."

Frederick Tyrrell saw the deceased four times, but Harding was always present, except that, on one occasion, he went out of the room for a few minutes to call the maid-servant, Apostles, and was also absent at a part of the execution; so that the examination of the deceased's capacity was always in the presence of the husband. He says, "that he was with her the first time about half an hour, and was satisfied of her capacity:" but the fact is, that he and his brother did not act on that opinion. They, upon conference, thought it best to call in Dr. Burrows. It is not necessary to examine minute discrepancies between the witnesses, nor to inquire whether a medical person, whose particular line of practice is attending lunatic persons, is more fit than other medical practitioners to form a judgment on the capacity of a mind weakened by paralysis, where there has been no delusion nor derangement. Be that as it may, Dr. Burrows' opinion is entitled to attention: but he, again, visited the deceased under the same prepossessions and prejudices. He states, "Two or three days previous to the 27th of February, 1827, (referring to a note witness made at the time) the deponent was called upon by Mr. F. Tyrrell, who informed him, 'that he wished deponent to see a lady he, Tyrrell, was attending at Walworth, who was desirous of making her will; but that she was very much debilitated by paralysis, and that her husband wished to have her state of mind, relative to its fitness for a testamentary act, properly ascertained: that disease of the mind not being within his particular practice, as it is that of the deponent, he, Tyrrell, had on that account applied to deponent, who on the 27th of February, met Mr. F. Tyrrell at the deceased's house, being then introduced to her as having called to see one of the deceased's servants: on that occasion he sat and conversed with the deceased nearly three quarters of an hour, after which deponent informed Mr. F. Tyrrell, that as far as he had seen of the deceased on that day, she appeared capable of disposing of her property, but that he could not come to a decided opinion on the subject until he had seen her a second time. Deponent was desirous of seeing the deceased a second time, because, although she was perfectly rational while he so saw and

conversed with her, yet she was under very considerable agitation, in contemplation of an operation which her maid-servant, of whom she spoke with great kindness, was to undergo; and deponent, not willing to increase such agitation, did not touch upon the subject of her will." Thus, then, the impression travelled: Dr. Burrows received it from Frederick Tyrrell; Frederick Tyrrell from Edward Tyrrell: Edward Tyrrell from Harding, the most suspicious and interested source from which the impression could possibly originate: and the deceased's wishes in that respect are highly improbable; are unsupported by any proof; and are contradicted by all the facts and evidence in the cause.

Dr. Burrows never saw the deceased but twice; on the 27th of February, when he and Frederick Tyrrell were there together; and on the 9th of March, when the instrument was executed. On the third interrogatory he says: "He never was alone with the deceased. Mr. Harding was in the room on both occasions for great part of the time." On the seventh interrogatory: "The deceased was alone when Mr. Harding introduced him and Mr. Frederick Tyrrell: he introduced respondent as a medical friend of Mr. Frederick Tyrrell, who had come to see the maid-servant. Mr. Harding went out of the room to call the maid-servant alluded to, but he returned saying, she had gone out."

This is the sort of contrivance by which the medical gentlemen were brought into the society of the deceased, in order to judge of her capacity. Contrivances are always suspicious. If the deceased really wished to make this entirely new disposition, had a capacity for the purpose, and was a free agent, why not frankly and fairly explain to her the object and reasons of the visit? Why did not Harding say to her, "Mr. Marsh and Mr. Delmar refuse to deliver up your will, and they suggest that you are not in a fit state to make a new one: under such base conduct, and unfounded insinuations, it is prudent, in order to insure the execution of your wishes and kind intentions, that respectable persons—persons of medical experience, of skill and judgment—should visit you, and converse with you, and learn your real wishes from yourself; I will bring respectable medical men for the purpose; you can have no objection to see and converse with, and satisfy, them of your intentions, and that what I represent are your own real wishes." This would have been proper and natural conduct, and having thus introduced these gentlemen, and thus prepared the deceased, the husband should have withdrawn from the room, if not from the house. "Far more was 57. necessary than the ability to answer a few questions on common topics: here was not only capacity to be proved, but here were volition and free agency to be ascertained, and to that point he should have desired the two medical gentlemen to address their inquiries. But here are these two medical men introduced by this contrivance on the 27th of February; a few questions are asked on common topics in the presence of the husband, on whose sole authority it is assumed that the questions are answered correctly: but still the visit ends by Dr. Burrows deposing "that he could not come to a decided opinion on the subject, until he had seen her a second time." After an interview of three quarters of an hour, this is the result even as to capacity. As to the power of making any will, he goes a little further on interrogatory than on his examination in chief, in one respect. In his answer to the eighth, he

says, "At his first visit he had no doubt whatever of the deceased possessing her mental faculties and power of reflection, sufficiently to enable her to make a general disposition of her property in one bequest, and to bequeath legacies to her servants; he cannot swear the deceased was able to recollect, know, and understand the purport of any former will which she had made. He has no doubt whatever that she was able, at such time, to comprehend the effect and purport of such a will as that she subsequently executed in his presence." This is the utmost length that Dr. Burrows can go, prepared as he was by the partial view which Harding exhibited to him of the deceased, and of her wishes. If this will were in conformity to her previous intentions, and declared or ascertained wishes, Dr. Burrows thinks she had sufficient capacity to give effect to the act: but if, when he gave his evidence, he had been in possession of the earlier history of this transaction, and of all the circumstances which preceded this will, then from his testimony it is clear, he must have arrived at a different conclusion, and have given a different opinion. His answers to other interrogatories infer as much: for instance, on the eleventh, he thus answers: "That when he visited the deceased on the 27th of February, he was informed by Mr. F. Tyrrell, as he best recollects and believes, that the deceased had, previous to her marriage, made a will in favour of some individual other than her husband, upon which respondent inquired, 'whether such individual was her next relation.' Tyrrell replied, it was not, but that she now wished to revoke that will, and to make a new one in favour of her husband, and that it was to satisfy all parties of the deceased's competency to make that new will that respondent was applied to." Now, though the person principally benefited under the will referred to was not a next of kin, yet it is to be remembered the deceased had no known relation. And how was this application to Dr. Burrows "to satisfy all parties?" What! the parties in whose favour the former will was made: they knew nothing of what was going on. "Respondent knew not, and did not hear that such former will had been made in favour of Mr. William Marsh or his family, or that such individual was one of the deceased's oldest friends, and a friend of her late brother—through whom he heard the deceased's property was derived: he never heard that the deceased, subsequent to her marriage, executed a will, by which she gave her house and furniture at Walworth to her husband absolutely, and 5000*l.* navy five per cents. to him for life, with reversion to his son by a former marriage, or that by such will she bequeathed the residue to Mr. William Marsh and his family." If then Dr. Burrows had known all the previous history, it is to be inferred, that he would not have sanctioned this instrument without some better proof, that she was acting of her own free, uninfluenced, will and wishes.

To revoke this former will so made and so adhered to, it was necessary that the deceased should be proved to have recollected at least its general contents; to have recollected, that she had distributed memorials among her friends; that she had provided for her servants; that she had given her husband a certain portion; that she had bequeathed the bulk of her fortune to those whom she had long adopted for that purpose, the children of Mrs. Amelia Marsh: it was necessary that she should be proved, upon some rational grounds negating the importunity of her husband, to have become desirous of abandoning all her for-

mer intentions; but to no part of her former will is there the least reference. That this new will was without the importunate influence of the husband, there is not the slightest appearance in any part of the evidence of Frederick Tyrrell, or Dr. Burrows. Harding is always present, he scarcely goes out of the room for an instant, and no question upon the point of free agency is put to the deceased.

Without then stating this preliminary evidence more minutely, there is nothing to convince me that the mind of the deceased was sufficiently probed to ascertain, whether she was or was not either a free or, as applied to such a will, a capable testatrix; nothing satisfactorily to discover what her real wishes were, without the restraint and influence of her husband. * It is a great but not an uncommon error to suppose, that ^{25 N.Y.} because a person can understand a question put to him, and can give ^{act. app.} a rational answer to such question, he is of perfect, sound mind, and is ^{23.} capable of making a will for any purpose whatever; whereas the rule of ^{1862.} law, and it is the rule of common sense, is far otherwise: the competency of the mind must be judged of by the nature of the act to be done, and from a consideration of all the circumstances of the case." In Combe's case, the rule is laid down in these words. (a) "It was agreed by the judges, that sane memory for the making of a will is not at all times when the party can answer to any thing with sense, but he ought to have judgment to discern and to be of perfect memory, otherwise the will is void." It is not answering, that "she had been round Clapham Common," or "that her house was leasehold," or the like, even if the questions were answered correctly and the husband had not been present, that would be sufficient in the present case. So again, in the Marquess of Winchester's case: (b) "by the law it is not sufficient that the testator be of memory, when he makes his will, to answer familiar and usual questions, but he ought to have a disposing memory so as to be able to make a disposition of his estate with understanding and reason." To support then such a complete revolution in the testamentary dispositions of the deceased, it was necessary to show that she had recollection of what the former disposition was, even supposing there were no grounds to suspect a mere tutored acquiescence under the influence of the husband. The influence of the husband, however, is much more readily inferred to have its effect than the importunity of the wife, and yet it is laid down, "If a man makes a will in his sickness by *the over importuning* of his wife, to the end that he may be quiet, this shall be said to be a will made by restraint, and shall not be good." (c) And, Swinburne says in respect to restraint, "Whereof no certain rule can be delivered, but it is left to the discretion of the Judge, who is to consider all the circumstances." (d) In my judgment in the present case, the circumstances are quite sufficient, prior to the application of the husband to Mr. Edward Tyrrell, and quite sufficient, from his presence upon all subsequent occasions, to require that he should afford the most satisfactory proof that the deceased was not a mere unresisting instrument in his hands, so taught, tutored, and impressed, as to say and do all that Mr. Edward Tyrrell states to have taken place.

With this view of the case it may hardly be necessary to go, with any minuteness, through the account given of the instructions and exe-

(a) Moore's Rep. 759. S. C. 8 Vin. Ab. 43. No. 22.

(b) 6 Rep. 23.

(c) 8 Vin. Ab. 166. No. 3.

(d) Part VII. s. 2.

cution. Mr. Edward Tyrrell having given entire credence to the representations of Harding, and to the report on the capacity made by the medical gentlemen, proceeded, on the fifth of March, to take the instructions; and his account of what then passed is stated at considerable length: and had it not been already so repeatedly cited in the argument, it might have been important here to have read it at length: but it will be sufficient to refer to parts of it. (a) His narrative, supposing it to be

(a) "Within a day or two after deponent (Edward Tyrrell) had learnt from his brother, that Dr. Burrows and he were both of opinion, that the deceased was in a fit state to manage her own affairs, he, deponent, informed Mr. Harding, who called on him, 'that he was now quite satisfied, and had no objection to attend to take Mrs. Harding's instructions whenever she should make an appointment.' An appointment was then made by Mr. Harding for deponent's attendance: in consequence whereof deponent, on the 5th of March, 1827, (having referred to his book) attended at the deceased's house in York Place, Walworth: on his arrival there about noon, Mr. Harding said, 'I am sorry our appointment was made for to-day, as Mrs. Harding has had a bad night, and is not very well to-day. Deponent said, 'he was sorry to hear it, but he supposed she was well enough to see him.' Mr. Harding said, 'that she was,' and the deponent was shown up stairs into a small sitting-room on the first floor in the front of the house; Mr. Harding accompanying him: they found Mrs. Harding alone evidently expecting deponent, sitting by the fire, and writing materials were on a table at hand. On deponent entering the room, the deceased with some difficulty rose to receive him; on which Mr. Harding said to her, 'Dont trouble yourself, Mr. Tyrrell will excuse your rising.' After deponent had taken a seat, as Mr. Harding did also, and after the deceased had made some inquiries after deponent's mother, and other branches of his family, who were known to her in consequence of her marriage with Mr. Harding, she proceeded to give deponent a statement of her affairs. The deceased of her own accord entered upon such statement, saying, 'I suppose Mr. Harding has told you what it is I want you to do, and how ill the Marshes have behaved to me.' Deponent told her 'that Mr. Harding had so informed him;' and deponent then said, 'that he was come according to her desire, as he had been informed, to take instructions for her will.' The deceased said, 'she was much obliged to him, but she wanted to know, what she should do to get her former will and papers out of the hand of Mr. Marsh,' (meaning Mr. Marsh the elder). Deponent asked the deceased, 'in whose hands she considered her will to be, whether in the hands of Mr. Delmar, or of Mr. Marsh.' She replied, 'that she supposed in the hands of Mr. Delmar, as she had executed it at his office, and left it there:' she said, 'that she had several times called on Mr. Delmar for the purpose of getting her said will out of his hands, but could not get it, and that she wished to have it that it might be destroyed.' The deceased gave deponent to understand that the will, she so wished to destroy, was made in favour of Mr. Marsh, but she did not otherwise specify its tenor: she, in continuation, said, 'that she was very uneasy at not being able to get any account from Mr. Marsh, and that she should be very thankful if deponent would exert himself to get both the will and the account from Mr. Delmar as soon as possible.' Mr. Harding then left the room: he had not joined in the conversation before deposed of in any manner, except to correct a date, and to correct the deceased, when in the course of such conversation she named Mr. Arthur Marsh instead of his father. What the deceased so addressed to the deponent was spontaneous on her part, and was not, in deponent's presence, dictated to her, nor was she, save as aforesaid, prompted in what she said. When Mr. Harding had so left the room (deponent and deceased being then left alone together) the deceased said, 'I wish to leave my property to Mr. Harding after my death, and to leave a legacy to each of my three servants,' at the same time naming the three servants: to the man-servant, whose name he does not without reference recollect, and to Mary Apostles, 300*l.* each; and to her other maid servant, whose name he does not recollect, 150*l.* Such instructions as the deceased dictated the same were by the deponent committed to writing, and he had written thus far, when Mr. Harding returned into the room. Deponent then asked the deceased, 'whom she appointed to be her executors?' She answered, 'Mr. Harding;' and turning to Mr. Harding and addressing him, she added, 'and the gentleman you mentioned to me.' Mr. Harding replied, 'you mean Mr. Tyrrell of Lincoln's Inn. The deceased answered, 'Yes.' Deponent then wrote down the name of Mr. Harding and of Mr. John Tyrrell as the deceased's executors. This done, the deponent, in the presence of Mr. Harding, read over to the deceased, in an audible and distinct manner, the instructions which he had, in manner aforesaid, committed to writing; and having done so the deceased

quite correctly given, appears at first sight strong and favourable; but the Court must consider, whether the bias and prepossession of the witness have not led him to colour his deposition in chief rather too highly. It must be recollected that the husband was present nearly the whole time. How far he may not have impressed, and by influence com-

signified her approbation by saying, 'Very well,' or something to that effect. The deponent then made an appointment with the deceased for the execution of a will to be drawn pursuant to the said instructions; the 9th of March was named, after which he took his leave. Between the 5th and 9th of March, deponent suggested to his brother Frederick that, to remove all doubts as to the capacity of the deceased, and all responsibility from him, the deponent, as a professional man, it would be proper for Dr. Burrows and himself to attend with the deponent to be present at the execution of the will then in preparation, which was agreed to; and accordingly, the will having been engrossed from a draft will, which in the interim deponent had prepared from the aforesaid instructions, deponent attended at the deceased's residence at about 2 o'clock on the 9th of March, meeting his brother and Dr. Burrows there, so nearly at the same time, that they were all shown into the deceased's sitting room at once; finding there the deceased and her husband. A few complimentary words had passed chiefly between Dr. Burrows and the deceased, when deponent produced the will he had prepared for execution, telling the deceased, that it was the will which he had drawn according to her instructions, or to that effect; and 'that he would read it to her.' The deponent then audibly and distinctly, and in a deliberate manner, read over the will. When he had read the legacy to the deceased's second maid servant, namely, as a legacy of 150*l.*, the deceased stopped him, saying, 'I wish so and so (naming the servant) to have the same legacy as the other two servants.' Upon which deponent made an alteration in the said will, by striking the sum of 150*l.* through with a pen, and by inserting in lieu thereof, and over the same, the words 'three hundred' or 'three' instead of the words 'one' and 'fifty.' Dr. Burrows then in an under tone to respondent, observed, 'that Mr. Harding had better leave the room while his wife executed the will,' and deponent suggesting it to Mr. Harding, he did so. When Mr. Harding had left the room, the deponent read over a second time, that part of the will which he had so altered, and the remainder thereof, and having finished, the deceased signified her approval of it by bowing her head: deponent then handed her a pen, requesting her to sign her name opposite the seal (already affixed); the deceased made an attempt to sign her name, first, with her right hand, and then with her left; but she was unable to do it; her fingers appeared to be contracted and her hand unsteady, which previous thereto was unknown to the deponent. Deponent perceiving the deceased's inability to sign her name, took the pen out of her hand, saying, 'we must get you to sign with your mark, Mrs. Harding;' to which she replied, 'Yes,' and the deponent, preparatory to such mode of execution, and to make the latter clause of her will, and clause of attestation conformable, altered the same severally, and, having done so, handed her the pen a second time, pointing with his finger to the seal, or place whereon her mark was to be made. The deceased accordingly made a cross: deponent then placed his seal on the wax impression, desiring her to lift it off, which she did: she next, at his desire, laid her hand on the will, and after his dictation, being so directed to do by him, she repeated the words, 'I declare and publish this to be my last will and testament, and request you gentlemen, present, to affix your names as witnesses thereto.' Dr. Burrows, Mr. Frederick Tyrrell, and deponent, then subscribed their names at the foot of the clause of attestation. While the witnesses still remained, deponent asked the deceased, 'what he should do with the will?' to which she answered, 'I think you had better keep it for me;' upon which deponent folded up the said will and put it in his pocket. After the usual parting compliments, deponent withdrew in company with his brother and Dr. Burrows, leaving the deceased and her husband together. Sophia Harding was, as well on the day she gave instructions for her said will, as on the day and time of the execution thereof, as deponent verily believes, of perfect sound mind, memory, and understanding, and well knew and understood what she at such times said and did, and what was said and done in her presence, and was fully capable, as the deponent verily believes, of giving instructions for and of executing her last will, or of doing any other serious or rational act requiring thought, judgment, and reflection. Deponent has no doubt whatever of her capacity, having in the first instance his attention drawn in a particular manner to the enquiry of that fact, as aforesaid: she, at the times deposed, was evidently very debilitated in bodily strength, and had almost lost the use of her limbs; her speech also was affected; and at times, particularly on the day of his taking the in-

pelled, her to say all this (if she did say it exactly as it stands upon the deposition in chief) may be suspected. There is sufficient to raise a presumption against the husband, that she was a mere instrument in his hands, and it was incumbent upon him to repel the presumption so raised. But it would be extraordinary if all did take place exactly in the manner the deposition is calculated to represent. Here is a long, smooth, fluent account of all the circumstances, which Harding had before represented to Mr. Edward Tyrrell; almost *totidem verbis*, all told without interruption; of her own accord; Harding not interfering, not dictating, merely supplying a date and the name of his co-executor. If this were so, it is extraordinary that Frederick Tyrrell after his first interview should have required the attendance of Dr. Burrows: if there was all this ready and active capacity, this clear expression of her wishes, it is extraordinary that Dr. Burrows should have desired a second interview, before he gave a decisive opinion of her being capable of making the sort of will he was induced to suppose she wished to make: particularly when, at this interview with Edward Tyrrell, Harding represented, that "the deceased had had a bad night and was not so well that morning."

But it is extremely difficult to reconcile this deposition in chief, so far as respects the spontaneity of the deceased, and the active part she takes in the communication to Mr. Edward Tyrrell, with what he himself states when pressed upon interrogatory. The Court cannot suppose that he has intended to give an unfair representation; but his bias may have caused him unawares, in his deposition, to convey a very incorrect impression of the real character of what took place. For example, he states this: "After deponent had taken a seat, as Mr. Harding did also, and after the deceased had made some inquiries after deponent's mother and other branches of his family, who were known to her, she proceeded to give a statement of her affairs." Now, on reading this account I was led to suppose that the deceased, recognizing Edward Tyrrell, began the conversation of her own accord, and therefore that her behaviour showed memory, intelligence, and alertness of mind, and all that might lead to the inference of spontaneity and capacity; and that this evidence was on that account important. Yet, on the eighteenth interrogatory, he says: "On entering the room, and being introduced by name, the deceased said to respondent, 'I hope you are very well,' and shortly after, 'I hope your mother is well:' she made the latter inquiry on respondent saying, 'that he had that morning seen his mother, who desired her compliments.'" This gives quite a different character to the inquiry: the one account inducing a belief that the inquiry originated with the deceased; the other showing that it grew out of a previous observation, and was such a remark as a person in a state of great imbecility might well make.

In respect to this "statement of her affairs," it is difficult to reconcile it with his own answer on the third interrogatory: "At the interviews which the respondent had with the deceased, and at which he was pre-

structions, she was for a moment flurried and shed tears; but the impression was very transitory; she soon recovered herself; on the day of the execution of the will, she was only once excited to tears, or apparently flurried; that happened, when deponent dictated to her the words of publication: she, for an instant, was then excited, but readily recovered herself, and repeated the words in a very firm and deliberate manner, showing that she knew and fully understood the import thereof."

sent with others, she did not speak until she was spoken to; when so addressed, she confined her answers, as much as she could, to monosyllables; but not always so: it appeared she did so on account of the difficulty of utterance under which she laboured: she never, in his presence, attempted spontaneously to join in general conversation: she only in general gave answers to the questions put to her, but she did, of her own accord, and not in answer to any question, make a statement to respondent on the day of his taking instructions for her will, viz. 'that she had been ill-used by the Marshes (her own words) and that she could not get an account from them, nor her will out of their hands.' " Here, again, is difficulty of speech: she seldom spoke but in answer to questions, generally only in monosyllables, yet she entered on a "statement of her affairs:" but what does the witness specify?—that she had been "ill-used by the Marshes, and could not get her will." These are the very circumstances about which Harding had been "worrying her," and might now either have impressed on her weakened mind or compelled her to hold out: or they are the mere repetition of what Harding had previously told Edward Tyrrell. It was the tale that was to be told and that might easily be learnt. As to "not getting the will," either she was capable or incapable: if capable, she must, I repeat, have been aware of the duplicate delivered to Apostles, and have purposely concealed it: if incapable, then she might have forgotten the existence of that duplicate, but then she would not have had mind and memory sufficient to remember the contents, nor consequently to revoke her will. But what is the ostensible reason?—"The Marshes had used her ill." Is that true? or, if true, does it account for cutting off all Mrs. Amelia Marsh's children, and passing over all her other friends, and abandoning all the other peculiarities of the wills of 1816 and 1818?

Again, how does Mr. Tyrrell state in chief the actual instructions? "After Mr. Harding had so left the room, deponent and the deceased being left together, the deceased said, 'I wish to leave my property to Mr. Harding after my death, and a legacy to each of my old servants.'" Now on reading this, it would be supposed the deceased, the moment she was left alone with Mr. Tyrrell, began the conversation, and of her own accord commenced giving the instructions, perfectly understanding, and spontaneously proceeding with, the transaction intended to take place; and in that view, as far as capacity was concerned, it would be a favourable fact: it would not indeed go far as to the control, marital authority, and undue influence of the husband (the more important branch of the case); for it was a short lesson easily imprinted and remembered, which was to be submitted to and repeated. But when the witness is pressed upon interrogatories, it has not even this circumstance (favourable at least to the capacity) of the deceased proceeding of her own accord to give the instructions: for, on the twentieth interrogatory, Mr. Tyrrell answers, "The instructions given by the deceased for her will were given freely by her, but not until respondent put questions to her on the subject: no third person was present. After two preliminary questions, (viz. whether she wished the will made by Delmar to be revoked; and to make a new will; to both of which the deceased answered 'Yes.') Respondent asked her, 'To whom she wished to leave her property?' she answered, 'To Mr. Harding after my death.' 'What! the whole of your property?' 'Yes, the whole, except legacies to my servants.' Respondent then requested her to give him the names of the

servants, and amount of their legacies, which she did with some difficulty, that is, she was not able to articulate their names readily; and she did not appear to have made up her mind till then as to the amount of such legacies. Mr. Harding at this period returned into the room: respondent inquired, who she would have as executors? She said, Mr. Harding, and, turning to him, added, 'and the gentleman you named.' Mr. Harding said, 'You mean Mr. Tyrrell of Lincoln's Inn:' she answered, 'Yes.' This gives a very different colour to the business: even these short instructions, instead of originating with the deceased or being delivered of her own accord, are extracted from her by interrogatories.

The Court has no reason to impute to the witness any intention to misrepresent; but he was duped: he was prepossessed: he had had repeated conversations with Harding: he had got thoroughly impressed that the deceased thought herself ill-used by Marsh; that she could not get her will; that she wished to make a new will and to give her property to Harding: he was not aware of the disposition in the former wills—the considerations on which they had been made—the manner in which they had been adhered to—the fruitless attempts Harding had made to get the deceased to take her concerns out of Marsh's hands and to transfer them to himself: not knowing these circumstances, perhaps it may be too much to impute to Mr. Edward Tyrrell even a want of vigilance, in allowing himself to be so imposed upon by Mr. Harding, or a want of penetration and sagacity in not suspecting his objects. But, hearing that there had been a former will and that the state of her mind was doubted, it is to be regretted that he did not inquire a little more into the contents of that former will, and probe the mind and memory of the deceased as to the disposition she had before made and was now about to revoke. Seeing also the large property she had at her disposal under these deeds of settlement made in the year 1816, how weakened she was in capacity, and how entirely the origin and conduct of this new will was managed by the husband himself—every thing passing in his presence except mere formalities—it is to be regretted that Mr. Edward Tyrrell's penetration did not point out to him the propriety and importance of satisfying himself, that there were no marital authority and undue influence interposed: and yet all he hunts after is a little testable capacity to give effect to a testamentary disposition, which, upon the previous representations of Harding, he allowed himself to believe she really wished to make.

If the instructions, with the previous visits of the two medical men, do not satisfy the mind of the Court as to the testamentary intentions of the deceased, the execution, on the ninth of March, carries the case no further. Here are the same sort of inquiries made: the husband is present, except being sent out of the room for a minute, just while the formality of the execution by the attempt to sign takes place. There is, however, the single circumstance of her desiring George's legacy to be increased and made the same as the other two servants. Whether even that circumstance is not more like a cunning artifice, devised by Harding, in order to give the deceased the appearance of capacity, than the spontaneous desire of her own mind, may admit of some doubt; for neither George's station, nor the length of her service, nor the deceased's former estimate of it, lead to her being placed on the same level with

Rigden and Apostles.(a) It may have been; and it looks, like a contrived suggestion of Harding; for his conduct has exposed him to every suspicion.

On the 11th of April the deceased has a fresh paralytic attack, and yet on the 21st here is a codicil obtained from her, which, Mr. Edward Tyrrell being out of town, Mr. Timothy Tyrrell is employed to prepare. He comes with the same prepossessions and impressions derived from Mr. Harding, and he ventures upon no better ground to communicate the same prepossessions and aspersions to Dixon, the medical attendant; for on the fourth article he says, "Deponent briefly stated to Mr. Dixon, that Mr. Marsh had prevailed on the deceased to make a gift to him of 10,000*l.* and had procured from her a will in his favour, and also, unknown to Mr. Harding, a settlement of her property." There is no proof of one nor of the other: the will is not in his favour, though it is in favour of part of his family. "That she had since made a will revoking that in favour of Mr. Marsh, and that the last will was in favour of Mr. Harding." All this he states as fact upon mere hearsay, proceeding from no better source than the imputations of a most interested party—the husband—who was getting a new will, almost exclusively in his own favour. Here the husband is still more directly an agent; he is the medium of communication between the deceased and the witnesses, the deceased being by the last paralytic attack rendered so weak as to be unable to express herself intelligibly to Mr. Tyrrell.

What then is the Court to consider this codicil?—the wish of a capable testatrix, or the fraudulent contrivance of the husband to give a semblance of confirmation to the will? The witnesses were off their guard, for, since it was to the prejudice of the husband, they might easily have pinned their faith upon him as to the volition of the deceased, not discovering that he might have quite a different object in view. The codicil confirms the will, but what is its disposing object?—to give rings to three near and dear friends of the deceased—the three Misses Binstead. The deceased by her will had given them an annuity of 100*l.* with benefit of survivorship: a ring is now substituted! that change is not very probable: but the fatal fact is, that two of the Misses Binstead were dead! the death of one, if not both of them, must have been known to the deceased. Harding might not have known either event, for the deceased does not seem to have been in much confidential communication with him; but what must have been the state of her capacity when this codicil was obtained? The transaction lies under a strong suspicion of being a contrivance to give the appearance of confirmation to the will: and it is the only confirmation; for as to any recognition of the act, through any disinterested parties, there is none.

The case in my judgment might rest here: but there are detached circumstances which throw some light upon the character and conduct of the transaction.

Repeated applications were made to Marsh for money, but all access to the deceased was prohibited him: drafts were drawn and presented, one for 400*l.*, a second for 100*l.*, and a third for 100*l.* When the drafts were presented, the signatures were suggested not to be the hand-writ-

(a) It appeared from Rigden's evidence on the eleventh article and thirteenth interrogatory, "that he went into the deceased's service, as footman, in 1795; Mary Apostles, as housemaid and lady's maid, in 1799; and Mary George as cook, in 1804."

ing of the deceased; Mr. Edward Tyrrell presented the last himself and said, he saw it signed. An offer was made to carry the money to the deceased, but access was refused. This seems extraordinary. What reasonable grounds could there be for refusal, if the deceased were a free and capable agent, dissatisfied with the Messrs. Marsh, and having with sufficient capacity transferred her entire confidence to her husband and freely made a will in his favour? She was under the protection of her husband, assisted by his attorneys, and residing in her own house: where could be the fear, or the objection to the money being carried and delivered to her? She would merely have had to recognize the draft, and declare her wishes to have the money. When the signatures had been doubted, it is extraordinary that the parties, for their own credit, did not insist that some person—if not one of the Messrs. Marsh, that some clerk belonging to their house—should accompany them to the deceased to verify the signature: but, even now, the drafts themselves are not forthcoming.

Here is, however, a letter, produced on the other side, dated the 31st of March, addressed to "Messrs. Marsh," demanding the delivery of the deeds, wills, and papers; and signed "Sophia Harding." Here are also a great number of drafts signed by the deceased from 1817 to 1820. The signatures to the earlier drafts are a neat formal hand; to the latter drafts, from the autumn of 1824, the signature becomes very slovenly, bearing very little similitude to the earlier ones, and the suggestion is, that the signature to the latter is a forged imitation of the earlier signature of the deceased. The explanation offered is, not that the deceased really signed the letter herself, but that her hand was guided by Harding. When she executed the will on the 9th of March she could not make any signature; she attempted but failed, and was obliged to make her mark—a mere cross. Whether a person, with her hand in this paralysed condition, could so far assist in the signature, or her hand could be so used, as to make a signature nearly approaching the original character of her handwriting, is more than the Court will venture to give an opinion upon: but here is her hand entirely in the control and use of her husband, and there is no proof that her mind was not equally under his influence and authority; he uses both to endeavour to get at her property and her papers, excluding from all access to her those persons to whom her property and her papers had been intrusted by herself. The inferences against the husband are obvious.

It should have been noticed that earlier in March, about a week after the execution of the will, Mr. Edward Tyrrell, in the character of the deceased's solicitor, wrote to Mr. Marsh requiring her account. Mr. Marsh, in his answer, says, "that he has directed his son to make out Mrs. Harding's account immediately, but before he puts it into other hands than her own, he deems it necessary to see the deceased in person; and he proposes, accompanied by Mr. Delmar, to meet Mr. Tyrrell at the deceased's house;" to this Mr. Tyrrell answers, that the deceased refuses to see him and has given orders that he shall not be admitted." Mr. Marsh replies, "he cannot consider such a message as emanating from her own free will, and must persevere in his determination, more especially as it is in compliance with her repeated injunctions, both to him and to his son, not to give any papers or information respecting her concerns but to herself personally." The truth of this is confirmed by the history and by the *res gestæ*. Here then is a careful

exclusion of Marsh, of his son, and of Delmar; here is an attempt to get the original papers and to get money; first by the solicitor, Tyrrell, then by drafts with the deceased's asserted signature, then by this letter, with a signature at best made by Harding guiding and using the deceased's hand: but though Marsh offers to attend with papers and to meet Mr. Tyrrell; though Arthur Cuthbert Marsh offers to carry the money and to deliver it into the deceased's own hand; though she is living in her own house with her husband, and Marsh only proposes to see her at a time to be fixed by Tyrrell, yet non-access is enforced under a pretended order from the deceased herself to exclude these, her longest and dearest friends. Certainly these circumstances do pretty strongly increase the suspicion, that Harding was at this time making use of the deceased as a mere instrument in his own hands, and for his own purposes.

There is one further circumstance to be noticed. The deceased died in the middle of the night, between the 7th and 8th of March. Harding alone was with her; no other person was present; no other person was sitting up; so that she must have died rather unexpectedly, though he admits her incapacity for a few days before her death. He states, "that she died about four o'clock in the morning; that he went out about six, leaving the bed-room locked up and no key in the door, and without apprising the servants of her death; that he returned about half past eleven, unlocked the door, and then told the servants of the deceased's death;" but he even then desired them not to communicate it to any one, particularly not to the Messrs. Marsh or Mr. Delmar. The next morning being the 9th, he and Mr. John Tyrrell are sworn executors, as appears by the jurat on the will. I cannot understand, if the making of this will was a fair and honest transaction, why, this poor woman dying in the night, her body was to be locked up and the matter kept secret from the servants for seven or eight hours, or why the death was afterwards to be kept secret, especially from the Messrs. Marsh and Delmar, or why there was this great haste in getting sworn to the will. Where was the necessity for this clandestinity and contrivance? Here was non-access to the deceased, and exclusion of the Messrs. Marsh, not only when the deceased was alive, but even after her death. What could induce an honest man, having acted honestly and fairly, to have pursued this conduct? It serves to confirm the suspicion, that Mr. Harding has throughout been a man of contrivance; that he has by misrepresentation induced witnesses to embark in his object, and that these persons have in a great degree been the dupes of his imposition.

Upon the whole, having in various parts of the case explained the feeling that has been impressed on my mind in respect to the transaction, and the grounds and principles upon which that impression has been formed, it is superfluous to recapitulate the several points. Considering the extreme improbability of this entire change of disposition—the means used by the husband to urge her to place her concerns in his hands—her long resistance till reduced to a weakened state of capacity—the presence of the husband conducting all those transactions, it is not proved to my conviction, that this latter will was the real mind and wish of a capable and free testatrix.

On the contrary I am of opinion, that it was the will of Mr. Harding—obtained by him by undue influence and marital authority—contrary to the real wishes and intentions of the deceased, as far as she was capable at that time of forming any testamentary intention.

In my judgment she never did depart with a willing and disposing

mind from that disposition of her fortune which she made in 1818. That will therefore remains her true will:—and, as the whole transaction of this latter will originated with Mr. Harding, and the whole expense of this suit was occasioned by him (for Mr. John Tyrrell is merely the nominal party), I feel bound in justice to condemn Mr. Harding in the costs of Mr. Marsh.

BIRD v. BIRD.—p. 142.

Where the drawer and attesting witnesses of a will, (executed ten days before death by a person of eighty-five, in weak bodily health) are confirmed as to capacity, volition, and free agency by adverse witnesses, and by the deceased's affections, declarations, and recognitions; the general character of the drawer (an attorney employed by the deceased for many years), and slight discrepancies in the evidence of the *factum* are not material. A will, in such a case, pronounced for, and the opposer, who had pleaded incapacity, conspiracy, fraud and circumvention, condemned in the costs incurred since the giving in of his allegation.

The *King's Advocate* and *Lushington*, in support of the will.
Burnaby and *Addams* contra.

JUDGMENT.

SIR JOHN NICHOLL.

The parties in this cause are the following. The deceased is John Bicknell: the person propounding the will is William Bird, a nephew and the sole executor: and the person opposing it is John Bird, another nephew and one of those entitled in distribution. The personal property is of the value of 10,000*l.* or 12,000*l.*, and the realty is about 200*l.* a year, in addition to an estate of about 300*l.* a year, entailed upon the heir at law. The deceased at the time of his death was a bachelor, and his family consisted of one sister, Sarah Bicknell; one niece, the daughter of a brother, Mary Waldron; and four children of a deceased sister named Bird, William Bird and John Bird the parties, Mary Webber and Joan Bond respectively married. The personalty therefore was distributable—one-third to the sister, one-third to the niece, Mary Waldron, and the remaining third among the four Birds, that is one-twelfth to each: so that supposing 12,000*l.* was to be distributed, the sister would take 4,000*l.* Mrs. Waldron, 4,000*l.* and William Bird, John Bird, Mary Webber, and Joan Bond each 1,000*l.*

The deceased's heir at law was a great nephew, John Bicknell, descended from an elder brother, Peter: to him the real estate would descend, but he is not entitled in distribution; a real estate, however, as I have already said, of 300*l.* a year which was entailed, devolved to him on the deceased's death.

Two wills are produced: one dated on the 21st of September 1787, forty years before the testator's death: but all the parties benefitted under it are dead, except his sister Sarah, who was a legatee under it for 300*l.*; so that that will would leave the deceased nearly in a state of intestacy.

The other will, the one propounded, is dated on the 13th of September 1827, ten days before the death; and it gives his estate at Stapley to his niece, Mary Waldron, for life, then to her son and his heirs: his estate, called Lippencotts, to his great nephew John Bird, son of William: an annuity of 100*l.* to his sister Sarah Bicknell; 200*l.* to his niece

Mary Webber, and 200*l.* to each of her daughters; 200*l.* to his niece Joan Bond; 50*l.* to his nephew John Bird, and 50*l.* to each of his children; 50*l.* to John Sharland, a great nephew; and 50*l.* to Lucy Hardwidge, a great niece, neither of whom are entitled in distribution. The house, garden, and orchard at Bradford, where he resided, to his sister for life, and then to Mrs. Webber. The residue of his real and personal estate to William Bird, who is appointed the sole executor. Here then all parts of his family who are, and some who are not, in distribution, are noticed: but the bulk is given to William Bird; and he is placed in the confidential situation of executor.

Who then is the party opposing the will? Not the sister, who in case of an intestacy would be entitled to one-third; on the contrary she is a witness against her own interest, in support of the will; not Mrs. Wal-dron, the niece, who also would be entitled to one-third; not Mrs. Bond, nor Mrs. Webber, conjointly with John Bird; but John Bird alone, who would only be entitled to one-twelfth under an intestacy: yet it is not even John Bird, for his son, an attorney, who has been examined, proves on interrogatory, that the real opponent is John Bicknell, the great nephew, who is the heir at law and not entitled in distribution. Instead of trying the validity of the paper at common law, where his real interest could alone be ascertained, where there would be a *viva voce* examination before a Jury, supposed to be the best mode of detecting fraud and perjury, John Bicknell has set up John Bird as the opponent here, and has agitated the question in a jurisdiction which extends only over personalty in which he has no interest. Certainly, this is an extraordinary mode of proceeding, not calculated at the outset to create favourable inferences respecting the opposition; for contrivances always suggest a suspicion that there is something wrong and rotten at the bottom.

The will upon the face of it is regularly executed, and is attested by three witnesses—the attorney who received the instructions and drew the will, and two respectable neighbours who were called in to see the fact of execution. They have been examined in support of the *factum*: and if they are credited, if the circumstances they state are believed, the case is proved. The drawer of the will details what passed at the instructions and preparation; which, if true, sufficiently shows the mind and intention of the deceased: that account is confirmed by the act of execution and by all the witnesses speaking to their belief, supported by the facts which then occurred, of the deceased's being of sound mind and capable of giving effect to the will.

Before examining the evidence of the *fuctum* more closely, it may be proper to refer to the grounds of opposition. These are,

1st. The state of 'the deceased's affections towards the different branches of his family, rendering this disposition improbable.

2. The state of his capacity; which, if not amounting to absolute and total incapacity, yet rendered him liable to fraud and imposition.

3d. A conspiracy between Mrs. Webber and William Bird to assume the custody of the deceased, and to exclude other parts of the family; and the consequent obtaining of this will by fraud and circumvention.

4. The association in this conspiracy of Symes, the drawer, a person of bad character, of low practice, and the particular friend of William Bird.

In support of these grounds of opposition a great mass of evidence

has been gone into, and great expense has been incurred. Each party contends for costs, and I concur in thinking it must be a case for costs: for if this fraudulent conspiracy is established, the party who has framed and engaged in it must pay all the costs incurred in detecting it: while, on the other hand, if the grounds of opposition fail; if the imputation of fraud is not sustained, the party who has been setting up an unfounded charge, a charge which he is unable to prove, must pay the costs which he has occasioned.

The mass of evidence, though great, does not require to be minutely detailed: but it will be sufficient to state the result of it upon the different points; and for that purpose the case (in comparison with the length of the depositions) lies within a very narrow compass.

The deceased was of a very advanced age, from 84 to 86, living at Bradford in Somersetshire, and his sister, Sarah Bicknell, who was four years older, resided with him. He had been engaged all his life in farming; part of the land which he occupied was his own property; and he being, as described, a penurious, reserved man, his property seems to have increased; for looking to the will of 1787, it is not probable that the property was nearly so considerable at that time. I have already stated what it was at the time of his death.

Upon the first head of opposition—the state of his affections—it is pleaded, that, “he had a great affection for his sister;” but this will is not inconsistent with that affection: for she was very old, she had a property of her own; he leaves her in addition to that property an annuity of 100*l*. and the house, garden, and orchard, for life. This, under the circumstances, is more probable, than by an intestacy to leave 4000*l*. at her own absolute disposal; but the more important part of the plea is, the particular regard for John Bird and the disaffection for William Bird. If that were proved, the principles laid down in the case referred to in the argument, and decided last Term, would apply. (a) The disposition would be against probability, and the case would set out with strong presumptions against the evidence of the *factum*: but if the fact be the very reverse; if William Bird was the favoured relation, then a strong foundation is laid, by the probability of the disposition, in order to support and corroborate the account of the instructions and execution.

To resort to particular circumstances in the depositions upon this head is quite unnecessary: whether the deceased was angry with William upon one subject, or with John upon another, need not be sifted; for the conduct of the deceased, in the different degree of intercourse he kept up with the two brothers, quite satisfies me. John Bird never came to the family parties at the Bradford revels—did not attend the funerals of the family—had very little communication with the deceased: it matters not in what this originated, whether in dissatisfaction at the conduct of John Bird respecting his father’s will, or his behaviour to his sisters; or whether it was of long date: the non intercourse continued to the testator’s death. John Bird had a large share of his father’s property: on the other hand, William Bird, whether right or wrong in his differences with his wife, is constantly in the most friendly intercourse with the deceased, is consulted by him, assists in the management of his farm, and in buying and selling his stock and crops. There are

(a) *Marsh v. Tyrrell and Harding*, *supra*, p. 33.

various circumstances showing that he was the favourite nephew; most of John Bird's witnesses admit those circumstances; and the deceased's partiality continued and was shown during his last illness and down to his death.

The effect produced was not extraordinary, viz. that several persons were impressed with the expectation that William Bird would have the bulk of the deceased's property. With respect to the affection pleaded for the heir at law, the evidence by no means establishes that the deceased had any intention, that more of the landed property should go to him than the entailed estates, of which the deceased could not deprive him.

Here, then, the main ground of opposition, the point of affection, wholly fails: there is no improbability in the disposition; none in selecting William Bird to be his principal heir and executor, and in giving small legacies only to John Bird and his children, in order to show no resentment in this last act.

The next ground is the state of capacity. The attempt to set up a case of total absence of testamentary capacity has been disavowed: but it is asserted that the deceased's mind was so weakened, as to be incapable of protecting him against fraud, undue influence or importunity. If so, if testamentary capacity existed, it is at least necessary that the practice of fraud and circumvention should be clearly proved. The fourth article takes a wide scope: prior to entering upon the account of the last three weeks of his life, it goes into the history of his former illnesses, one five years before; another six months before. Where parties resort to such long ranges, bearing so remotely and slightly on the real point in issue, so far from serving their own cause, they only afford marks of its weakness. The substance of this long article, which occupies three pages, is as above stated. It thus concludes: "That from the commencement of his last illness, but more especially during the last three weeks of his life, the deceased was of unsound or greatly weakened and impaired mind and memory, and was in a state and condition both mental and bodily, which peculiarly exposed him to, and rendered him absolutely incapable of protecting himself from, either actual fraud practised upon him, or undue influence and importunity; and that at no time within that period was the deceased competent to the making and executing of the pretended will, propounded in the cause, or to the disposition of his real and personal estate therein contained, or to the doing of any other complicated act of that or the like nature requiring thought, judgment and reflection." This is a little deviating from the usual form in pleading capacity, but the Court will take the article, as it presumes it was intended.

Now it is unnecessary to go further back than the deceased's last illness. Up to that time he was quite an extraordinary old man of his age, in full possession of his faculties, mental and bodily. John Bird's own witness, Bridge, a medical man, who, however, never attended the deceased, who was but slightly acquainted with him, who never saw him during his illness, who is brought to give a speculative opinion upon a supposed case,—says on the ninth interrogatory: "he last saw the deceased about six weeks before his death, he was riding on horseback alone about a mile from his own house. His conversation was upon common topics, and lasted a minute or two." This was the state of the deceased up to his last illness.

The principal witnesses to support the description given in the fourth article, wholly disprove it;—Bennett, a labourer, who sat up with him at nights; and the medical attendant, Mr. Liddon. The deceased's illness was a violent inflammation of the lungs, which affected his breathing, and required the application of a blister on his chest: after a time he had the thrush, which affected his speech till his mouth was cleansed. Bennett did not attend in the day time, only by night, till the last week or ten days, and even then in the day time only occasionally. It is true that this witness states, "the deceased used sometimes to say things deponent could not make out: this was not constantly, only now and then: at times he was quite sensible." But what might be the wanderings in the night, "now and then," of a person labouring under an acute inflammatory disorder, or during the last few days of his life, is not very material. This account goes but a little way to prove general incapacity, or even what is called "fluctuating capacity." It is not necessary further to consider his evidence, as the Court has before it the much more satisfactory testimony of the medical attendant, produced by John Bird in support of his plea, Mr. John Liddon, who deposes; "he knew Mr. Bicknell for a period of twenty-seven years; and from 1816 to the deceased's death was his constant medical man: the last illness which the said deceased had, was about a month previous to his death; by reference to his book he is able to depose that he first went to attend the deceased, in consequence of it, on the 29th of August, 1827, and he died on the 23d of September following; deponent was sent for to attend him as he had been taken ill; the message, which was brought by the boy Burford, did not describe it as urgent; and on going to Bradford, he found the deceased had been ill some few days: he was in bed breathing with great difficulty, and, with what deponent never observed in him before, an intermitting pulse: the inflammation on the lungs had come on as usual, and from the first moment he saw him, deponent considered the case to be a lost one; the deceased was worse than he ever had seen him: he had not at this time a complaint which came on in an after state of his illness, viz. the thrush, or, as it is called by the common people, the white mouth: it always indicates a breaking up; it is an alarming symptom, but this did not appear for a fortnight after. Deponent, from the time of his so going to see the deceased, attended him regularly twice a day till his death; he never missed a day without seeing him once, but on two days, the first or second visit was paid by his brother and present partner Henry Liddon: one of these was the day before his death, the other was about a week after deponent's first visit as near as he can recollect. Deponent's times of attendance were eight in the morning, and six in the evening: he believes the deceased wished him to come oftener, for he understood from Mrs. Webber that he complained of his neglecting him; but deponent could not go oftener as Taunton is five miles from Bradford." He then describes the remedies he applied, which "for a few days occasioned a slight improvement, and deponent began to think the deceased might again rally, but he soon relapsed, and after a fortnight the white mouth came on; deponent checked it for at least two days, but it again got a-head, because the deceased refused to take the medicines ordered; he would not take any medicines for the last fortnight." Then, after detailing the means used for clearing the phlegm from the deceased's throat, Mr. Liddon continues: "the deceased, from the first of his at-

tending him, was confined to his bed; he never saw him attempt to get out of bed or return into it, and from the decay of his bodily powers, which was extremely rapid, and such as to force itself on the deceased's attention, and produce depression of spirits, he thinks he could not do this without assistance; for in raising the deceased for the purpose of gargling his throat they were obliged to prop him up; nor could he feed himself, except occasionally he would put a cup to his mouth:" deponent further saith, "that the visits he paid the deceased were generally of a quarter of an hour's length, sometimes longer, or just as he was able to extricate the phlegm, but never shorter; he cannot depose to having on any occasion heard the deceased utter an irrational or incoherent expression." From what I have already quoted, it is manifest that this witness had the best opportunity of judging of the condition and capacity of the deceased: and he does not remember an "incoherent expression." "He cannot say, that on any occasion, when he saw the deceased in his last illness, he considered him to be in an unsound state of mind, or in a state unfit to make his will, or do any serious or rational act, or even an act that might require some little exercise of thought; he never saw him but he appeared quite capable to dispose of his property, or to make any testamentary arrangements to which he might feel inclined: their interviews were pretty much alike, and their conversation respected chiefly, almost exclusively, his state of health; deponent on entering the room generally said, 'Well, Sir, what is the report of the day?' and he recollects his invariable answer was, 'I do not feel very well, Sir;' it was always that, for deponent recollects his rejoinder was 'Very well Sir, why no, Sir, I suppose not, or there would be no need to see me:' and the deceased, in reply to deponent's hoping he was better, would often say, 'I don't think I shall ever be better in this world,' or to that effect: deponent recollects being struck with this as showing the belief he had, that he was sinking, which he had never done in any former illness." Therefore, prior to this, the deceased might not be impressed with a sense of his dangerous state. "Deponent never recollects to have seen him in any particular state of exhaustion, or weakness, more at one time than another, but every day he was getting weaker; he was never in deponent's presence in such a state as not to be excited to attend to what was passing around him; he always attended to deponent, except the last day or two, when a degree of stupor came on." This it is to be recollected, was several days after the will had been executed. "Deponent has no idea that the deceased was unable to protect himself from fraud, undue influence, or control: to deponent he always appeared quite his own master, and was able to resist any improper interference with his concerns."

Here, then, is a complete disprover of the case set up, by the proposer's own witness, a medical person, attending twice a day, at eight in the morning and six in the evening, competent, and having full opportunity of forming a judgment, and showing that the deceased was fully capable of making a disposition of his fortune; negating that he was peculiarly liable to be circumvented, or imposed upon, as alleged in the plea: at all events rendering it necessary to show by decisive evidence, that fraud and circumvention were practised upon him.

The next ground is, a conspiracy formed by Mrs. Webber and William Bird, they obtaining the custody of the deceased, and excluding the relatives, and taking Symes for their associate. Of any custody, of

any exclusion of his relatives, there is no proof; but the reverse is proved: for John Bird, the son of the nephew, not a youth, but a young man, of the age of thirty-one, an attorney at Taunton, was admitted, and was alone with the deceased after he knew that the will was made. He states, "that on the average during the last eight years he may have visited his uncle about once in two or three months, and on such occasions has dined with him." "About a week or ten days before his death, (on the Monday or Tuesday after the making of the will) having heard of the deceased's illness, he went to his house, and saw him in bed, for about fifteen minutes: the deceased knew him, shook hands with him, said, 'how is your health now?' This person had been in ill health, a circumstance with which the deceased was acquainted. On the Monday or Tuesday then, after the witness understood the will was made, there was no custody—no difficulty of access—no incapacity. This charge, therefore, is quite unfounded and disproved. Next, where is the proof of fraudulent conspiracy? Mrs. Webber was the person who sent for Mr. Symes, but the will is against her interest; and proof of preconcert, between her and William Bird, there is none.

The case now arrives at the *factum*,—not with any ground of improbability against the disposition, nor semblance of adherence to the old will (though no disaffection existed towards the party principally benefited thereby)—not with a testator deprived of testamentary capacity, but proved, by his own medical attendant, to possess faculties equal to the act, and to be not liable to imposition: the case itself too stripped of any evidence of fraud and contrivance; nor was there any concealment; for Mrs. Webber had previously mentioned the subject to Mr. Liddon, who was of opinion, that the deceased was not incapable.

On the afternoon of the 12th of September, Mrs. Webber sent a note by the boy Burford, desiring the attendance of Mr. Symes; but here again was no concealment, for Burford told Bennett where he was going. Bennett said, "he dare say it was to make master's will." Burford went to Symes's house; he was not at home, but Burford found him at Mr. Were's, and delivered the note. William Bird happened to be there at the time, and was not at Bradford concerting the plan with Mrs. Webber, nor was he expecting that Symes would be sent for, otherwise he would have kept him at home or had him near Bradford. Symes had been employed by the deceased for several years; he had seen the deceased before during this very illness, but was not so forward as to hint, or suggest, a will to him. The deceased, as I have observed, under this old will, made forty years before, was in effect in a state of intestacy. Persons, however, who are saving money, and altering and adding to their property almost continually, are very apt to postpone making a disposition of it by will: if penurious, they do not like the expense—they fear they may have to do it twice over; and even the extreme of old age does not extinguish the spirit of postponement and procrastination.

Symes arrived, and had an interview with the deceased on the evening of the 12th. I see no improbability in his relation of what passed, as applying to the deceased, still less any improper conduct of Symes; on the contrary, with propriety and forbearance, he waited till the deceased should commence the business. He says, "He found the de-

ceased alone, and very ill in bed: deponent was very much struck by the great alteration in his appearance, and from his look deponent believed he would not recover. The deceased said, 'he had got a blister on his stomach:' he shook hands with deponent, and requested him to sit down by the bed-side, which he did; the deceased then said, 'he had sent for, and wished to speak to deponent about some property of his (which deponent knew well) at Wellington, that he wished to sell it; and thought he could obtain a good price for it:' he went on talking about his houses and estate there, but deponent thought it was no time for the deceased then to be thinking of selling his estates." They conversed upon this and other business for about half an hour, when the witness, "finding it late, rose to go: the deceased seemed as if he had not done what he wished, and said, with an anxious manner, 'when will you come again, Mr. Symes?' Deponent replied, 'whenever you please, Sir;' he answered, 'can you come to-morrow?' deponent said, 'certainly, if he wished it;' the deceased added, 'at what hour?'—'at any hour it might suit him.' 'Would ten o'clock suit deponent?' 'It would;' and deceased then requested him to be there at that hour, which deponent promised. He then went away; the deceased shook hands at parting, and said, 'he should expect deponent at ten o'clock.'" It appears, however, that Symes afterwards resolved to be at the house earlier, in order to meet the medical man. There was nothing unnatural in this conduct in the deceased: he could not prevail upon himself to begin the subject, and Symes very properly forbore to introduce it, but the deceased himself appointed him to come the next morning. This, as really passing, is not improbable, but as a fabrication, is highly so. The deceased had a very bad night. Bennett states, "he thought the deceased could not have got over it, but he certainly did revive wonderfully, and he believes the deceased was as sound in mind during that morning after, as during all his illness; may be more so." This again is not adverse to the transaction: if he were thinking about the will he was going to make, it might render him more than usually restless; if his disorder was really more violent that night—if he had spasms and paroxysms of pain, as Bennett describes him to have had, it would be the more likely to decide him to proceed with the making of his will the next morning. There is, therefore, no improbability in the course of the transaction. Liddon saw him in the morning, conversed with him, was of opinion he was capable, and mentioned to the deceased that Symes was below stairs.

There is some confusion in Symes' account, as given upon his first and second examination, as to the time when he was at the deceased's house on the morning of the 13th; but it does not appear to be any thing more than lapse of memory; not wilful misrepresentation. Symes proceeds to give an account of the preparation of the will, and of receiving the instructions from the deceased, which he immediately committed to writing. It is said, that it was a "will by interrogation:" but it was not what is generally understood; by the expression; it was not, will you give such a person, such a sum? and then a mere affirmative acquiescence; but in this case some of the persons were named, and the deceased freely and voluntarily declared what he would give. He himself began the instructions: Symes thus deposes: "he found the deceased in bed, but evidently much better:" agreeing with Bennett in that respect. "Deceased bid him sit down, and at once entered

on the subject of this will: 'Mr. Symes, I wish to speak with you about making an alteration in my will.' " Great stress has been laid on the term "alteration in my will:" but I do not see the force of the observations, nor that any advantage can be derived from them; for if the deceased were capable of making an alteration in his will, he was equally capable of making a new will. Symes proceeds: "that never having made a will for the deceased, although he had been his solicitor for many years, he asked him, 'if he had a will?' deceased replied, 'he had; but wished it to be altered, or an addition made to it.' Deponent wished to see the will: to this deceased objected, and said, 'he could not.' " Much discussion ensued about the production of this old will: the deceased persisted in saying 'it could not be seen,' and Symes, after repeating in reply, 'then really, Sir, I cannot make the codicil,' quitted the room, informed William Bird (whom he met in the passage or on the stairs) of what had passed, and the witness was, in a few minutes, called up again into the bedroom: "He found the deceased sitting up in bed, apparently he had been out of bed, and W. Bird said, he had helped his uncle out, to get the will himself from the bottom of an old coffer at the foot of the bed: . . . the deceased had evidently read the will, or Bird had read it to him, for he said to the deponent, 'I must make a new will altogether.' . . . Pen and ink being brought, deponent took the deceased's instructions from his own mouth to prepare the new will; he made no draft of it, he wrote it off fair at once, in the deceased's presence: he commenced writing the deceased's name, residence, and date, and then looked for directions to the deceased, who said, 'I shall give Molly Waldron, my niece, my estate at Stapley for her life, and after her death, to her son Peter.' " So it was the deceased, who commenced the instructions; "deponent did not know the estate, but he considered it freehold, and wrote down a devise thereof accordingly: he then looked to the deceased for further directions: the deceased was silent, as if considering what should come next, when Mr. Bird said (they three being alone in the room) 'do you mean, uncle, to give my son, John, any thing?' to which deceased replied, 'I'll give him my place at West Buckland.' Deponent inquired the name of it: deceased said, 'it was called Lippencotts;' that name deponent wrote down, and asked, 'in whose occupation?' the deceased replied, 'my own:' deponent concluded it was a freehold, and, as deceased did not say it was for life only, (as with the devise to Mrs. Waldron,) he gave it in fee." This clause did spring from a question put by William Bird; but it was the deceased who settled what the devise should be. Symes proceeds with a circumstantial detail of the instructions;(a) and if all his statement be true,

(a) "As deponent was looking to the deceased for something more, Mrs. Bicknell, deceased's sister, who deponent knew well, came into the room and exclaimed, 'Brother, what will you leave me?' he answered, '100*l*. a year:' deponent inquired, 'if he should charge his remaining real estate with this annuity,' and deceased replied, 'Yes,' and deponent made it so. Mrs. Bicknell then left the room, but afterwards came in again: Bird then said, 'What do you mean to give Mrs. Webber'—(the deceased's niece, then in the house, who came into the room for a short time, but not, as he thinks, till after that part of the will was settled:) the deceased said, '200*l*.' The deceased was still sitting up in bed; he addressed his answers to deponent, who wrote that legacy down; Bird then added, 'What do you mean to give her children?' the deceased said, 'the same to each.' Deponent knew Mrs. Webber had four daughters and no sons, and he wrote that legacy also. Bird, as before, then asked, 'What do you mean to give Joan Bond?' (William Bird's sister, whom deponent knew well, as indeed almost

there is no doubt of the deceased's volition, nor was there any thing of dictation: the deceased decided for himself, and his family were all brought fairly to his recollection. But the main point for my consideration is, the disposition of the residue; and, in respect to that, William Bird had actually quitted the room before it was bequeathed. He was not named to the deceased: so this part of the transaction proceeded from the testator himself. If, then, this evidence can be believed, and if the witness be not wholly discredited, can I possibly doubt of capacity, intention, and volition? Here were free agency and the absence of fraud and circumvention.

It is unnecessary to proceed with this account of the preparation of the instrument. Two respectable neighbours, apparently quite disinterested, were called in to see and attest the execution. It is true, much did not pass in their presence: but it was not natural that the deceased—with an inflamed chest, with a blister on, with a white mouth beginning, and being in some degree exhausted by the preparation of the will—would be disposed to say much: but he recognized them, he asked for his spectacles, he signed, he published the instrument, he shook hands with one or both of them; and he thanked them. The witnesses at the time were satisfied of, and they now believe in, his testamentary capacity. There is some little variation between these witnesses and Symes as to the publication: but little variations will not affect the truth of the transaction. Symes says, the deceased himself, of his own accord, used the words of publication. Rendell, the second witness, that the deceased was beginning to publish, but that Symes took this part of the matter up, and then the deceased repeated the words after him; and Carpenter, among other grounds, judges, that the deceased was, on this occasion, capable, from the way in which he repeated the words of pub-

all the deceased's relations;) the deceased, in reply, said, '200*l*.' he wrote that also: Bird then said, 'What will you give brother John?' he replied '50*l*.' he did not assign any reason for giving John Bird less than the rest: but William Bird asked, 'And what will you give his children?' he replied, 'The same;' deponent asked, 'if he knew their names?' he said, 'No,' deponent understood there were eight, and said, 'Shall I write, to all the children that shall be living at your death?' and the deceased replied, 'Yes.' William Bird then inquired, 'what the deceased would give John Sharland?' married to a great niece of the deceased, and he said, '50*l*.' Before, however, deponent could write this legacy, Bird left the room: and deponent then asked the deceased himself about Sharland's Legacy: the deceased gave him the same answer, and he wrote it down. 'I mean,' the deceased added, 'to give the Bicknells 50*l* a-piece.' (John Sharland's wife was a Miss Bicknell.) There was another daughter, Mrs. Hardwidge, and deponent asked, 'if he was to put her name down for 50*l*?' and the deceased said 'Yes.' At this time Mrs. Bicknell had come into the room again, and said, 'Brother, do you mean to give me any thing more? where am I to live—am I to be turned out of this house?' (or to that effect:) to which the deceased replied, 'No, you shall have the house as long as you live.' Deponent then inquired of the deceased what it consisted of, and he replied, 'there was a house, orchard, and garden; I shall give them to her for life, and, after her death, to Mrs. Webber.' Deponent wrote all this down, and the deceased then asked him (they were now alone, for Mrs. Bicknell had left the room) 'to add up the legacies, and tell him their amount.' Upon deponent informing deceased they came to 1,750*l*. (so he thinks,) the deceased, who said, 'I did not think it was so much,' or to that effect, seemed a little hurt at not having left more for the residue: deponent then said, 'Who is to have the rest?' the deceased replied, 'I shall give the rest to William, (meaning William Bird) and make him my executor,' or to that effect. Deponent accordingly wrote this also, and having read it over several times to himself to see that there was no mistake in it which required correction, he added the concluding period, 'In witness whereof I have hereunto set my hand and seal the day and year first above written.' "

lication after Symes. There is nothing of material contradiction in these accounts: the proof then of instructions, execution, and capacity is sufficient on the *condidit*, unless there be some other circumstance to overturn it.

The remaining ground of impeaching the *factum* is the character of Symes: it is alleged that he is "a person of bad character, of low practice, a friend of William Bird, and that he made certain drunken declarations subsequently." Supposing all this to be true and proved, though it must shake his credit, so that the Court cannot give full faith to his single testimony, yet if he is supported by probability, and corroborated by other circumstances, the act itself and the instructions of the testator would not be defeated. If this were a will against all probability—the deceased nearly in a state of fatuity, or in the custody and under the control of the person benefited, the general character of the attorney might indeed be important: but the disposition and the whole course of the transaction are probable, and the evidence of the witness is confirmed.

To go then, into the general character and line of practice of Symes—to hunt up witnesses to prove that, thirty years ago, he was extremely ill-used under the popular outcry set up of his being a common informer, or the clerk of a common informer—to produce witnesses in order to attempt the introduction of a great deal of extraneous and irrelevant matter into the suit,—such proceedings only show the sort of spirit in which the cause has been conducted; and the same observation applies to the evidence respecting the disputes between William Bird and his wife. Symes may be more concerned in recovering debts than in drawing conveyances, but he does both; and, what is to his credit, he pays over the money when he has received it: he has long resided and practised at Wellington—from twenty to thirty years—his character must be well known—yet several of John Bird's own witnesses have employed him. The very professional duties of a country attorney, however respectable he may be, necessarily produce some enemies; and the unsuccessful suitor, whether client or adversary, is, not unfrequently, ready to censure, and be angry with, the attorney.

There is one other circumstance to which I think it necessary to advert. Symes was the friend of William Bird, and both seem much too fond of drinking—a vice which, according to the evidence, is rather prevalent in that part of the country; and on the day, and after the execution, of the will,—elated for the sake of his friend and excited by liquor, Symes did, very imprudently and very improperly, go into a large company and express himself about this business in a very unbecoming manner. Such a communication was a great breach of his professional duty; but in these declarations, loosely made and loosely recollected, there is nothing satisfactorily proved to have been said, that imports fraud or conspiracy in the making of the will. It was elated joy at a valid instrument having been executed—it was vain boasting and disclosure.

If, however, the witness be in some degree shaken in credit, or confused in his recollection, still if the general substance of his evidence be corroborated by circumstances, the case is proved. There are circumstances of that description—testamentary declarations previously made by the deceased, and subsequent recognitions that the act had taken place.

The declarations, detailed by Shattock, appear quite natural and probable, and I see nothing to affect the credit of that witness in the par-

ticulars which he relates. (a) Though the deceased generally was a reserved man, not addicted to speak of his concerns, yet the circumstances deposed to were such as to call forth the declarations, and they nearly concerned the witness; so that he is not likely to have misapprehended them: and the sincerity of the deceased is confirmed by his general conduct and confidence towards William Bird. So long ago, then, as 1817, he intended to appoint William Bird his executor, and to make a will in his favour; it was therefore no transient intention—it was long decided, and is consistent with his conduct and intercourse, though he procrastinated, and postponed the execution of his purpose.

The other declaration came from the deceased the last time he was at Buckland, shortly before his death, just when his illness was commencing, and tends more directly to show that the instructions for this will originated with himself. Shattock says, "in the wheat harvest preceding the deceased's death, the deceased rode up to him, and began a conversation by asking deponent, 'whether he had made up his mind about the fields?' deponent said, 'he had not exactly done so;' upon which the deceased observed, 'that he should very much wish to know,' and added, 'I'll tell you my reason, for I feel this illness and pain in my stomach, and I don't think I shall be here many years: I have made my will, but it is many years ago; it is an old will of a great many years standing, and I mean to make another, and William Bird will have the management of it:' these were his exact words as near as deponent can recollect them, but deponent is quite sure they were to that precise effect: he says the last observation about William Bird was made in answer to the deponent, who, inquiring as to the rent, said, 'I can't tell, Sir, into whose hands it will fall after your death:' to which he said, 'As to that I can make your mind easy, for William Bird will have it all, and I mean to give him the greatest part of my property.' Before parting, the deceased said, 'Now do let me know in a day or two, because I want to make my new will.' After this the deponent did not see the deceased." This latter part of the conversation connects itself with, and in some degree accounts for, his conversation with Symes on the evening of the 12th: but finding himself worse on the night of the 12th, he, on the morning of the 13th, went at once to the making of the will. On that morning, immediately before the testamentary business, was his conversation with Liddon, his medical attendant. The evidence

(a) John Shattock, a yeoman, after stating that he was intimate with the deceased, that they conversed together about their families and property; and that he had borrowed money of the deceased,—went on: "In 1817, deponent called upon the deceased to repay him: William Bird happened to be at the house that day, but deponent and deceased went into a private parlour together, and deponent told the deceased what he had come for: the deceased did not like to have the loan back because he could not get so good interest for it elsewhere, and he tried to make deponent keep it, and said, 'he should have it at four and a half per cent. interest:' deponent well recollects, on that occasion, the deceased remarking, in order to induce him to keep it, 'Why, Mr. Shattock, you know the money you have of me is not like what you might have of any body else, for, you know, I shall never trouble you for it; and even when I do miss (meaning when he died) I can tell you whose it will be;—it will be William Bird's:' he at first said, 'a person in the next room,' and afterwards Mr. Bird; 'and I will, if you like, go and speak to him, and I am sure he will always let it be in your hands in the same manner, and you shall not be troubled about it:' he also said, 'you know there will be no expense to you of bond or mortgage, or any thing of that sort:' he very much wanted deponent to keep the money and to go and speak to William Bird, but deponent was determined that the deceased should take it back."

is by no means immaterial, and is to the following effect: "On the morning of the day on which the will in question was made, he was at the deceased's, and was then introduced to Mr. Symes: Mrs. Webber asked deponent, 'whether he still thought her uncle in a fit state to alter his will?' deponent replied, 'he would go up and see:' he accordingly went up; asked the deceased the necessary questions connected with his disease; found him pretty much the same as usual; believes the thrush had not come on: in the course of conversation, he said to the deceased, 'I understand you are about to alter your will; Mr. Symes is below—do you feel equal to it?' And the deceased replied, 'I think I do.' Deponent added, 'I hope you will go through it well.' Upon returning to the room where William Bird and Symes were, deponent said, 'Mr. Bicknell is in a state to attend to you, Mr. Symes.'" And, on the 26th interrogatory, the same witness—after he has stated what he communicated to Mrs. Webber about the deceased's blister; and that he had perused the will of the 13th of September—answers, "He verily believes the deceased was of sufficiently sound mind, memory, and understanding on that day to have given directions for it, and to have comprehended every clause therein, and to have executed the said will, more especially, because in the evening of the same day, on his second visit, respondent inquired of him, 'If he had gone through what he wished, and how he bore it?' and the deceased said, 'He had done it, and bore it very well.'" This evidence—coming from such a witness—to capacity, to testamentary intentions immediately before the act, and to a recognition of the act so soon after it had taken place, coupled with other circumstances, is so confirmatory of Symes as to leave no doubt, in my mind, in respect to the proof of the *factum* of this will; and I therefore pronounce for it.

And as the charges of fraudulent conspiracy, set up and founded on misrepresentation of the state of the deceased's affections and of his incapacity, and those of controul and custody, have each of them so failed in proof, and as the whole cause has been conducted with so much litigious acrimony, and with attempts to introduce much irrelevant matter, justice requires the sentence, pronouncing for the will, should be accompanied by a condemnation of the opposer, John Bird, in all the costs occasioned by his giving in his allegation.

MYNN v. ROBINSON and Others, by their Guardian.—p. 169.

After publication, the *evidence* of an attesting witness may be excepted to by the party who produces him.

The admission of an allegation responsive to an exceptive allegation reserved to the final hearing, the Court being of opinion that that part if otherwise admissible, was not material, and that the remainder probably would not in the event be of sufficient importance to delay the cause.

When the will of a married woman—obtained, while she was in an extremely weak state nine days before death, by the active agency of the husband—the sole executor and universal legatee,—wholly departed from a former will deliberately made a few months before, the presumption is strong against the act; and the evidence not being satisfactory, the will pronounced against, and the husband condemned in the costs.

Declarations of testamentary intentions, if unaccompanied by any immediate acts, are always looked upon with great caution, and their weight depends upon all the circumstances accompanying and connected with them.

The proctor being the "dominus litis" is responsible to the Court for the purity of the proceedings.

THIS was a cause arising upon the will of a married woman, made, under a power, shortly before her death, and exclusively in favour of her husband: some circumstances respecting the non-production of Robert Hone, an attesting witness to such will, are noticed in 1 Haggard, 68. Since those proceedings, allegations had been given in on both sides; publication of the evidence had passed; and on the by-day after Trinity Term, 1828, an allegation, exceptive to the testimony of Robert Hone (examined upon the *condidit*), and given in on behalf of the husband, whose witness he was, was debated. The allegation set forth that Robert Hone had sworn, "that he verily and in his conscience believes the attestation clause, now appearing at the foot of the paper (bearing date the 2d of June, 1827) was not written when he signed the same: he has no recollection whatever thereof, and that he never could have signed it had the clause been written; that it contains a direct and palpable falsehood, and has been interpolated and introduced subsequent to his signature." And on the 31st interrogatory—"To the best of respondent's recollection, there was a blank in the place where the attestation clause is now written in the said will, when he first saw and signed the same." The allegation then pleaded, that Hone had therein knowingly and wilfully deposed falsely; that the attestation clause was not introduced since his subscription: "for that the will was written by William Whitehead from the dictation of his brother George, a witness in the cause, to whom instructions for the same had been conveyed through the party proponent (viz. John Mynn, the deceased's husband) about a week before the execution; "that W. Whitehead also at such time, from the dictation or by the direction of his said brother, wrote at the foot of the will the attestation clause preparatory to the execution of the will; that such clause is of the handwriting of W. Whitehead, who never had possession of or saw the will from the time when he wrote the same and the attestation clause thereof, until the 2d of July, 1828." The third article—after reciting Hone's answer on interrogatory, viz. "That the will was attested in the room on the ground-floor of the deceased's house, but not in the presence of the deceased; that after such attestation was concluded, they, the witnesses, had some refreshment, when the producent took them all up stairs, to the leads or roof of the house, for the purpose of seeing the prospect; and they remained there about ten minutes"—pleaded, "That Hone neither did nor could, on that or any other occasion, go up to the leads or roof of the said house, either alone or accompanied by any person, for the purpose of viewing the prospect or for any other purpose; for that there were no leads, nor was there any flat surface whatever (save as hereinafter excepted) on the roof of the house."(a)

The *King's Advocate* and *Lushington* in objection.

(a) The article went on to describe the only access to the roof; and set forth very minutely the dimensions of the door in order to show that a person of Hone's stature could with difficulty, if at all, have got through it; and that it opened into a gutter so narrow as only to admit of a person standing on the roof by placing one foot therein and the other on the sloping tiled roof; and that no prospect whatever was visible from the gutter on the roof beyond the tiles and bricks with which they were surrounded. A plan and measurement were annexed.

This is quite a novel experiment to except to an attesting witness, produced by the party who now attempts to discredit him.

Burnaby, Dodson, and Addams, contra.

An attesting witness is rather the witness of the Court than of the party, and the circumstances under which this person was produced are peculiar, and render his evidence suspicious: though our witness nominally, he comes forward to depose against us, and against his own act. The true rule at common law is, that where a person produces a witness, he cannot except to his general character, but may produce other witnesses to contradict his testimony, if he deposes unexpectedly contrary to the case of the party on whose behalf he is examined. *Alexander v. Gibson, 2 Campbell, 555.* This allegation is not to attack his general character but rebut his evidence, and is therefore within the common law principle. The matter is stringent: if Hone's evidence be true, our case is utterly false. In order to uphold his own credit it was necessary for him to get rid of the attestation clause; and the second contradiction is hardly less material: the assertion was clearly introduced in order to account for his being up stairs, if any of the witnesses should depose to that fact.

Per Curiam.

I think this allegation is admissible. In the case of *Goodridge and Hunter v. Slack*, the party was allowed to except to a witness originally produced by himself, but who had afterwards been produced on the other side, and deposed, on the second examination, in direct contradiction to his own act and to his former deposition.(a) But it is for the

(a) *GOODRIDGE AND HUNTER v. SLACK.*

John Underwood, an attorney, was originally produced on the part of *Goodridge and Hunter* in support of a will, alleged to be dated on the 14th of December, 1782, of which *Goodridge* was an executor and residuary legatee. Of this will *Underwood* was asserted to be the drawer, and in his examination on the condidit had deposed, positively and minutely, to instructions on the 6th of November, 1782, to approbation, capacity, and execution on the day of the date. It was suggested, that this will was an absolute forgery; that the deceased never gave any instructions, and had executed a will on the 4th of November 1782, of which *Slack* was executor; that the last mentioned will was deposited in an iron chest, and was taken out by means of a false key; that *Underwood* took a copy and made a will in *Goodridge's* shop; that the witnesses were let into the deceased's house on the 29th of January 1783; that the deceased was then in a state of insensibility; that the pen was put into his hand, and guided by *Goodridge*; that the witnesses then went down stairs and signed; that afterwards, the date being thought to be too late on account of the deceased's incapacity, another will was made dated on the 14th of December, 1782, subscribed by the witnesses before execution, and that *Goodridge* undertook to procure the execution of it.

To establish this fraudulent transaction *Underwood* was examined on the part of *Slack*, and deposed to the above effect in direct contradiction to his own act and to his former deposition. After publication, an allegation, exceptive to several witnesses and consisting of twenty-two articles, was offered on behalf of *Goodridge and Hunter*.

The opposition was confined to the eleventh and thirteenth articles in contradiction to the depositions of *Underwood* and his wife: but no difficulty seems to have been raised on the ground that the witness had been before produced by the party now excepting to him. The following is a note of what passed:—

Dr. Harris and Dr. Scott. A party is not at liberty to plead to a witness what he had the opportunity to plead against an allegation.

Dr. Wynne and Dr. Bever, contra. The general rule is liable to exception. Our parties, when the allegation was given, were in custody charged with having forged the will; they have been acquitted since publication in this cause. The matter now offered formed a part of their defence; and it would have been injudicious to have revealed it antecedently.

party, under the advice of his counsel, to consider whether it is worth while to attack the credit of Hone, his own witness; it is hardly probable that, in such a mass of depositions, the sufficiency of the evidence

Per Curiam. (Dr. Calvert.)

The objections to the two articles are of the same kind, namely, that you are now contradicting a deposition, what you might have done before to an allegation. It is a rule that after publication you cannot plead as to facts—so far the cause is considered as shut: but it is also a rule that you may to witnesses, provided any thing shall have arisen from their depositions which you could not have contradicted from the plea. I think the circumstances of this case are particular: the danger of a trial for life—the caution necessary for the exposition of the defence. When the proofs on this allegation shall come before the Court, the time of contradiction will be considered. No evidence on this exceptive allegation will be received as to facts in the cause: what may be said can only go to the credit of the witnesses; for the cause is closed as to the facts.

Allegation admitted.

•• The Court finally pronounced against Goodridge's will, and in favour of the draft of the will propounded by Slack.

In *Inglefield v. Inglefield*, originally a suit brought by the wife for restitution of conjugal rights, and in which the husband had, in a cross suit, pleaded and examined witnesses to his wife's adultery, a further allegation was offered on the part of the husband, and the Court (*Dr. Calvert*) in remarking upon it, said: "It is strange that the husband, in the eighth article, should charge Webb, his principal witness, with perjury;" but as this allegation is given in on the part of the husband, upon whom the expenses will fall, I shall admit this article."

Note.—In the two preceding cases the witnesses objected to were examined on both sides, and the exceptions were taken to that part of their evidence which was given by them when produced on behalf of the adverse party. So, in *Mackenzie v. Handasyde*, (Prerogative, 1828, June 30; and S. C. *infra*, p. 91), an exceptive allegation was admitted to John Williams, who attested both the will and the codicil, and who was produced by one party in support of the will, and by the other party in support of the codicil; and the exception was to that part of his evidence which was given upon his production by the adverse party. But, in the case in the text, *Mynn v. Robinson*, the exceptive allegation was given to a witness produced and examined only by the party excepting to him. 92.

Now it is a well known rule at Common Law, that "a party cannot be permitted to produce general evidence to discredit his own witness; that is, a party cannot prove his own witness to be of such a general bad character as would render him unworthy of credit; but if a witness unexpectedly state facts against the interest of the party that called him, another witness may be called by the same party to disprove those facts." 1 Phillips on Evidence, 294; and the authorities there cited.

But in the Ecclesiastical Courts, where the depositions are never seen till all the witnesses have been examined, it is necessary that parties, though they may not before publication attack the general character of their own witness, should be permitted, after publication, directly to except to his credit; because as no plea unless exceptive, and no evidence unless on such a plea, can be given at this stage of the cause, parties would otherwise be precluded from contradicting their own witness falsely deposing to the occurrence of matters which might go to the foundation of the whole case, and yet to which it could not have been foreseen that he would speak. The variation, however, between the practice of the Common Law Courts and of the Ecclesiastical Courts, arises only from the different manner in which the evidence is taken, and the different opportunities thereby afforded to a party of obviating the effect of his own witness unexpectedly deposing against him; and is a variation in form rather than in substance. At Common Law, the primary purpose of the examination of other witnesses is to support the party's original case; the accidental consequence, to discredit the first witness; or, as Mr. Justice Buller expresses it, "the other witnesses are not called directly to discredit the first witness, but the impeachment of his credit is incidental and consequen-

* It appeared, that Webb, the alleged *particeps criminis*, had been examined on both sides.

on the *condidit* and to the *factum* would depend on the degree of credit to which this man is entitled.

Allegation admitted.

On the second session of Michaelmas Term, an allegation responsive to the above exceptive allegation was debated, and was, in substance, as follows:

The first article pleaded generally, "that full credit was due to Hone; that he had not deposed falsely, as set forth in the exceptive allegation."

The second, after reciting the third article of the exceptive allegation, pleaded, "that Hone did not answer untruly, for that the will was attested below stairs and that he did go up stairs to the roof: and that he on the same day mentioned the mode in which the will was attested to Mr. Laurence; and shortly afterwards to Eaton, Norcutt, and Thorpe, witnesses examined in this cause; that he also had mentioned to them, that he had been carried up to the roof of the house for the purpose of seeing the prospect."

The third pleaded "the arrangement of the rooms in the attic of the deceased's house; and that in the gable end of one there was a window, from which was a prospect."

Against this allegation it was argued, that the declarations of Hone could not be received in corroboration of his own evidence; and that the rule was so laid down by Lord Redesdale, in the case of the Berkeley Peerage. (a)

On the other side:—that Chief Baron Gilbert considered such declarations as admissible; that Mr. Justice Buller originally was of the same opinion, though in the latter editions of his work, he seemed in some degree to have departed from his former doctrine: (b) and that, in the Berkeley Peerage case, the declarations of Lady Berkeley, *recenti facto*, were received in corroboration of her evidence at the bar of the House of Lords, though subject to future revision.

Per Curiam.

Looking to the former proceedings in this cause, it is full time that the evidence and pleas should be closed unless this allegation contains something very material. It is stated to be responsive to the exceptive allegation. The first article is to be considered as merely introductory: the second pleads facts which have already been deposed to, and which can only be repeated by Hone; and it also pleads certain declarations made by him *recenti facto*. The present shape of this cause is extraordinary: the persons who support the will have attacked the credit of the subscribed witness: those who oppose the will are now sustaining his credit. As I suppose it is not intended to re-examine Hone in respect to the attestation taking place down stairs, the principal part of the arti-

tial only." (Buller's N. P. p. 297. 5th Edit.) On the other hand, in the Spiritual Courts, the primary purpose of an exceptive allegation is to destroy the credit of the witness; the accidental consequence to support the original case. The practice in both Courts, however different at first sight, produces the same result, and originates in the same good reason and sound principle; viz. "that there is no rule of law by which the truth is on such an occasion to be shut out, and justice perverted."—*Per* Lord Ellenborough, C. J. in *Alexander v. Gibson*, 2 Campb. 336.

(a) See *Phillips on Evidence*, Vol. I. 307. 5th Edit.

(b) Buller's N. P. 294, and note the difference between the early and 5th, 6th, and 7th editions.

cle must relate to the declarations. Now, if this case had assumed a different shape; if the opposers of the will had pleaded in exception to the credit of the subscribed witness, these declarations might have been material and admissible, but they are now brought forward for the purpose of supporting his credit. Without entering into the law, whether such evidence can be received, I am satisfied that this part of the plea is not material, even if otherwise admissible; because Hone has already deposed to it. At the end of his deposition he says, "that on the very same day the attestation of the will took place, he mentioned all the circumstances to Mr. Lawrence, a student of Lincoln's Inn, also to Mr. Norcutt, a solicitor, and to others of his friends, from doubts that he had." Now, in the exceptive allegation, it is not attempted to deny that he ever made such a declaration: Lawrence and Norcutt might have been produced to disprove that circumstance; such a contradiction would have been much more important than the contradictions as to the leads of the house, and the prospect therefrom. The fact, then, that he did make these declarations, having been sworn to by Hone, and being uncontradicted, it is very immaterial to produce witnesses in support of it: the Court will assume that the declarations were made, as no attempt has been made to disprove them.

As to the third article, the only fact capable of further proof is, that the prospect may be seen; for Hone alone can swear to the fact that he was taken up stairs for the purpose of seeing the prospect, and that, he has already done. It cannot surely be of sufficient importance, at this stage of the cause, again to open these proceedings in order to receive such evidence as could be given on this article. If, at the hearing, the question, whether it was possible Hone could be taken up stairs under the pretence of seeing the prospect, should appear of sufficient weight as touching the credit of the witness, the Court may either direct some of its own officers to inspect the house, or may even allow witnesses to be examined on this article; but considering all the circumstances of this case, I cannot think it necessary for the opposers of this will, in order to sustain the credit of Hone, to press that this article should be admitted to proof at present; and I therefore suspend the admission of this allegation till the hearing of the cause.

This cause came on for informations and sentence on an extra day after Michaelmas Term, when the Court, having only heard the Counsel on behalf of the husband, proceeded to give judgment.

JUDGMENT.

Sir JOHN NICHOLL.

Although the present question arises on the will of a married woman, yet, since there is no doubt of her power to make a will, as if sole, the case is to be decided upon the ordinary principles of testamentary law.

There are two wills before the Court, the *factum* of the earlier will is not controverted: the case principally depends upon the proof of the *factum* of the latter will—mainly, indeed, upon the evidence taken on the first plea, or *condidit*; yet there are some other collateral circumstances to which it is important to advert.

The first will was executed on the 23d of November 1826.(a) The

(a) Its general substance was as follows: After some directions for her funeral—a bequest of the furniture, plate (except a tea-chest with silver canisters to her nephew,

latter will is dated on the 2d of June 1827; and its tenor is, altogether to sweep away the first will; and to give exclusively to the husband—who is named the sole executor—the whole benefit in the deceased's real and personal estate. The deceased died on the 11th of June, nine days after the date of this paper. Looking then no further than to the dates, and contents of the two documents, and to the death, there is a demand for clear and full proof. Here is a full and formal will made only eight months before, disposing of her property among various objects, and here is another will, dated only nine days before her death, wholly departing from that disposition, and giving every thing to the husband. On the very surface, there is a strong suspicion of the exercise of undue influence of marital authority: the evidence, it is true, may clear away that suspicion, and it therefore becomes proper to examine the history of the parties.

The deceased, Mrs. Catherine Mynn, was a lady of considerable fortune and of a very respectable family. Soon after the death of her mother, she took a house at Westbourn Green, where she had an establishment suited to her station in society—she kept her carriage and had servants in proportion: she was at this time above forty. The deceased had several brothers—they resided at some distance—had their different avocations; and though, certainly, there does not appear to have been any quarrel, yet there was no very great frequency of intercourse, nor particular warmth of affection subsisting; she had even complained, in some measure, of their neglect and coldness. A spinster of this age, living alone, with an independent fortune, and with her own establishment, was not an unlikely person to be sought by, and to fall a prey to, some needy adventurer, who would form a matrimonial connexion for the sake of her property.

Mr. John Mynn, who afterwards became her husband, and is the present party, does not stand quite clear of the imputation of having acted with such views. He was the younger son of a gentleman farmer in Kent, who had a large family; and being intended for the medical profession, served some short time with two different apothecaries, but he disliked and gave up that line of life, and we find him, for about three years, lodging at the house of Whitney Milborne West, at that time an apothecary at Hammersmith, but who afterwards got a diploma from Scotland, and is now a doctor of medicine, and a subscribed witness to this will. With a son of this Dr. West, Mynn formed a partnership as a coal-merchant, but they carried on business in a very inferior mode. They seem to have had no wharfs nor waggons, nor even a regular office with clerks: but they received little orders at a house in the borough,

William R. Robinson,) linen, &c. in and about her house at Westbourn Green, to her husband, absolutely; and also of the use and occupation of such house and premises, free from rent and taxes, for six months next after her death; it directed that her brothers, Charles, and John Peter Robinson, and her said nephew, their executors and administrators, should stand possessed of all her real and personal estate, upon trust to pay an annuity of 700*l.* to her husband; and upon his death, to assign over her freeholds in Bishopsgate street, to her nephew John Travers Robinson, and the sum of 12,000*l.* three per cents, with the unapplied interest thereof, unto and among the children of her nephew William R. Robinson, who should be living at the death of her husband. The will then gave various legacies—some of 300*l.*—to her relations: it named her trustees to be executors, with 100*l.* each for their trouble over and above the several legacies before bequeathed to them, and appointed her brother, John Peter Robinson, residuary legatee.

where an elder brother of Mynn was established as a hop and seed merchant.

In 1823, Mynn and his partner, West, took a house at Westbourn Green, next door to the deceased; whether with a view to this lady and her fortune, or whether accidentally, is not ascertained by the evidence: but at this place Mynn had an establishment, a horse and two-wheeled carriage, a man-servant and two maids; and visitors occasionally staying with him. Here he became acquainted with the deceased by meeting her at an evening party, and at the very first meeting he paid her particular attention; their acquaintance was improved upon, and in July 1823, it ended in marriage. What was the relative situation of these parties. He was sixteen years younger than she—he was without a farthing—deeply in debt—at least 1500*l.*, and probably much more. That he practised a gross deception on the deceased, as to his situation and property, cannot be doubted: he pretended to be in partnership with his brother as a hop and seed factor; no articles of partnership were ever entered into, and no real partnership is shown ever to have existed: he asserted that he was not in debt; the fact was clearly otherwise; for he was, in a very short time, harassed by his creditors, notwithstanding the assistance of his friend and connexion, Martin, who, within two or three months after his marriage, advanced him 1500*l.*; executions were taken out and sent into his house, much to the distress and annoyance of the deceased, till at length in November 1825, he rendered himself (as the phrase is) into the rules of the King's Bench: attempts were made to obtain a composition with his creditors, but that negotiation failing, he became, in November 1826, a bankrupt, and his debts amounted to about 7,000*l.* How debts to that amount were incurred does not appear, for since the period of his marriage he had been partaking of his wife's establishment at Westbourn Green. He obtained his certificate, but no dividend whatever has been paid; and finally, on the 27th of April 1827, after living within "the rules" for sixteen months, he obtained his release, and returned to Westbourn Lodge; there his wife was dying of a cancer, her recovery was quite hopeless, and her death took place in six weeks afterwards.

A character, more exposed to suspicion in every circumstance relating to the will he has produced, cannot well be described or conceived. That Miss Robinson's family should be averse to the marriage was very natural. One of her brothers was referred to the house in the Borough, respecting the partnership in the hop business, but William Mynn was not at home, and Mr. Robinson was taken up into the drawing room: no books were produced, and no partnership, I repeat, up to this time has been shown to have existed. Miss Robinson's brothers, finding her nevertheless determined to marry John Mynn, did not interfere in the settlement: that was undertaken by a very respectable and friendly individual, Mr. Peter Free, her cousin, but who had no interest in her property. Attempts were made by Mynn at the time to procure more favourable terms, but his propositions were resolutely rejected by the deceased herself, and he at length agreed to the terms of the settlement required; and various efforts were subsequently made to get at her property, in order to relieve his distresses; but the settlement was strict, and the trustees were firm. It is asserted that the deceased gave verbal promises to some of the creditors; but, except such promises, and any

assistance which she may have given out of her income, she did not involve herself and her property for the payment of his debts.

It has been relied upon in argument that she was strongly attached to her husband—showed him great affection—constantly visited him, even during his residence within the rules of the King's Bench, and that he at all times, and after his release, treated her with great kindness and attention. This is proved by the evidence on both sides, and is almost the only circumstance of recommendation to his case: but it was naturally to be expected: she had married him from affection and fondness—it was his interest to be kind to her—he was dependent on her, and was endeavouring to obtain present assistance as well as looking to receive her fortune for his future provision. But what was the effect of all this attention on the one side, and of all this affection on the other, on her testamentary intentions? for that is the object of the Court's inquiry: nor is the Court left to inferences from their mutual kindness to each other; because it has before it a will solemnly made by the deceased two or three years after the marriage, and eight months before her death. In November 1826, after his deceitful and imprudent conduct had been fully developed to her, after he had been in confinement for twelve months—after his bankruptcy, she made her will—made it in the most careful and deliberate manner: she went herself to her confidential solicitors, Dunn and Wordsworth, who had prepared her settlement: her brother Charles accompanied her, but he left her alone with Mr. Wordsworth; and she having delivered her instructions in writing, they together canvassed every item, particularly the annuity to her husband, whether it should not be void if he attempted to sell it, but she at length determined not to fetter it with any conditions; “expressing a hope, that the lesson he had received would produce an amendment in his habits;” the draft was sent to her, some trifling alterations, principally in the wording of it, were suggested; the will was then engrossed, and on the 23d of November the deceased again went to the office; the will was all read to her; “she expressed her entire satisfaction and approval thereof:” and it was then executed and attested by the two Duns and Wordsworth.

After this deliberate testamentary act, it is useless to be drawing inferences from affectionate conduct, or from declarations, that it was a mere temporary disposition: and what removes all suspicion that this will was made under the influence of the brother is, that on going to Dunn and Wordsworth, either for the instructions, or the execution, she was actually accompanied by her husband in the carriage who lifted her out of, and into, the carriage, but did not go into the office. Indeed, the provision made for the husband is a liberal one, and, being by annuity, was in some degree guarded against his future imprudence. Why should he not have been satisfied? On his marriage he was without a farthing in the world: since, he had been much embarrassed: in short, he ought to have been very thankful for such a bountiful bequest. A suggestion, that this act was not the deliberate wish and permanent intention of the testatrix, was founded upon the declarations of the deceased, which, if really made, were probably uttered in order to get rid of importunity, or to impose.

On the 27th of April, Mynn quitted the rules of the King's Bench. The deceased was at that time in a very precarious state; her cancerous disorder was advancing; she was confined to her house, and was only

carried down stairs to a sofa in the drawing room. An attempt was made to induce her to advance 2000*l.*, in order to set Mynn up in business; but it was found that the trustees had not even the power to make such an advance. Whether the deceased really wished for this measure, and was disappointed and angry, is not very material, for she does no act in consequence of it till the testamentary act—the subject of the present suit.

Whatever declarations were made at this time under the feelings of irritation, were accompanied by no immediate act, and therefore amounted to nothing. The Court always looks to declarations of this kind with great caution, and more especially so under the circumstances of this case. Their weight in all cases depends much upon the whole of the circumstances that accompany, and are connected with, such declarations. They are liable to be insincere on the part of the deceased, or if sincere, the effect of a mere transient feeling; they are liable to be misapprehended, and their extent exaggerated; they are liable to be misrepresented by others, or they may even be an after-thought invented to prop up a weak and defective case; and, in the present instance, many of the declarations are considerably exposed to this latter suspicion, namely, that they were either invented by the witnesses, or by those who have imposed them on the witnesses, and made them fancy that such declarations were made. In short, the Court can venture to place little reliance on them when connected with the account given of the *factum*; which in all cases is the main consideration, but which, in this, in a more especial manner demands the attention of the Court: and to the account of it I now proceed.

In the latter end of May—the particular day is not fixed—Mynn, the husband, went to one Whitehead in Boyle-street, and desired him to draw a will for the deceased immediately, giving every thing to him, the husband; Whitehead, with the assistance of his brother, drew up the instrument, leaving a blank for the date; and in three or four hours afterwards Mynn returned, and the instrument was delivered to him to get it executed. With this sudden haste was the instrument prepared! Mynn himself, if Whitehead speaks truly, was surprised that such should be the intention of the deceased: or he might say so, in order to diminish Whitehead's surprise: *a priori*, therefore, the thing was improbable, which renders some of the declarations now brought forward not very credible, and throws an increased doubt over them. This is the account of the drawing up of the will: the instructions given, not by the deceased but by the husband—the executor and universal legatee. The execution was on the second of June: the three attesting witnesses, Dr. West, Thain Wright, and Mr. Robert Hone, were on that morning fetched by the husband from Hammersmith—about three miles distant.

West states, he took the will up stairs to the deceased and said to her; “As she was better she could sign her will. She replied, ‘Yes, I will.’ he then said, ‘Now, Ma’am, you know the contents of this will, as it is a gift of all your property to your husband.’ The deceased replied, ‘Yes, I do.’ she then signed it.” This is the whole account, in substance, of what passes at the subscription. “He brought it down again with her signature to it. The three attesting witnesses then went up stairs: the deceased, repeating after West, acknowledged the signature and published it as her will, but said nothing else; and the witnesses attested it.

Now, this is the summary and substance of the act of execution, even giving credit to West's, the most favourable, account of it. The husband procured a merely formal execution—not indeed a formal one, for the will was not read over; nor signed in the presence of the witnesses: the husband himself was present: the deceased was confined to her bed, within nine days of her death; her approaching dissolution fully known to the husband: and by this will, so drawn up and so executed through the agency of the husband, the former will—so deliberately made only seven months before—is to be swept away, and every thing given to this husband!

The act itself and the mode of effecting it are each so indicative of fraud and undue influence on the part of the husband, that it could hardly be sustained by the testimony of the most respectable witnesses: the facts would be insufficient.

The deceased's capacity was not gone—her mind was not affected by delirium, but she was extremely weak, labouring under a painful disorder, taking laudanum to lull her sufferings—and in the hands of this husband—the active agent in the whole business; so that it could hardly fail to be considered as an act done under undue influence and undue marital authority. If the deceased's mind and wish had really gone with this new disposition, it is hardly credible but that either her own solicitors, Dunn and Wordsworth, or at least some respectable solicitor, would have been called in to receive the instructions from herself: and that he, her medical attendant, Mr. White, and some of her own acquaintance in the neighbourhood, would have been summoned to attest the regular execution. The mode adopted could hardly have been resorted to in a fair case.

But who are the witnesses that the Court is to rely upon, even for this account of the *factum*? and how has the cause been conducted? Of John Mynn himself the history has been already given. The drawer, Whitehead, describes himself to be “a certified conveyancer and in the habit of transacting annuities:” he has been frequently concerned in negotiating loans of money for various persons, and in April 1825, procured 840*l.* by way of annuity for John Mynn: he has also lent money to him “to the amount of upwards of 3,000*l.*” Such is Mr. Whitehead's line in the profession, and such his connexion with Mynn: he supplied him with money on annuity, and became his creditor for upwards of 3,000*l.*: he continued his confidential adviser during his imprisonment; and attempted to prove under the bankruptcy; but Springett, the assignee, (Mynn's own witness) states, that “Whitehead appeared in person—produced an account—all the creditors exclaimed against it—the commissioners rejected it—he did not prove any debt—he was not allowed to prove—he was proposed as assignee, but the commissioners said, ‘That could not be as he was not allowed to prove.’” (a) Such was Mynn's selected drawer and associate. In all Mynn's transactions before, at, and after the death of the deceased, Whitehead has been his agent and adviser, and has been twice examined in this cause: he admits, that “he cannot swear he is wholly disinterested in the event of this suit, as the producent is indebted to him in a sum of money,

(a) On interrogatory, Mr. Whitehead answered, “that under the commission of bankruptcy issued against Mynn, he took no part whatever: he did not prove, nor offer to prove, a debt.”

which he expects in any case to recover, but he should get immediate payment if the producent should succeed." This witness entertains some distinctions about propriety, which are rather difficult to be understood. On the 22d interrogatory he says, "It was in consequence of the producent being then indebted to him in a large sum that he did not attend the execution of the will, and he did not for the same reason send one of his clerks: he was of opinion it would not be either decent or prudent for him, being a creditor of the producent, to do so:" and yet "being a creditor of the producent," and "not wholly disinterested in the event of the suit," he thinks it not indecorous to be the agent and adviser in the conduct of the suit; to consult repeatedly with Mynn and his proctor, though he must have been informed that, as the drawer of the will, it was necessary he should be examined; and he has been twice examined on very material points. The evidence of a person so mixed up with the transaction is entitled to no great credit; nor does the conduct of the business exonerate it from the suspicions which otherwise attach.

The first subscribed witness is Whitney Milborne West: he was, as I have said, an apothecary practising at Hammersmith for many years, but has recently obtained a Scotch diploma, and practises as a physician; still however he carries on the business of an apothecary which is conducted for a salary by an assistant, Thain Wright, another subscribed witness. Dr. West, on the interrogatories, makes an apology for his deposition in chief, in respect to the presence of the husband at publication, and attributes the error to the defect of his memory, occasioned by an accident; and Mynn's counsel also make that the ground of apology for the inconsistencies of his evidence; and it would be advantageous and fortunate for this witness if all the contradictions in, and to his evidence could be attributed to the same cause: he has long been intimately acquainted with Mynn and in some degree connected with him—his son was Mynn's partner, and married Mynn's sister a few days after Mynn married the deceased: that son also became a bankrupt: indeed Dr. West himself was likewise a bankrupt—twelve or fourteen years ago: bankruptcy seems almost infectious among these parties: he was not only specially fetched to attest this will, and took with him his assistant Wright and his friend Hone; but the will was placed in his custody; he attended on the death; he sealed up the effects; he has been throughout the suit an active agent: it is true, that on both his examinations he says, "he had no meetings with any person on the subject of this cause save to be produced as a witness—simply that:" and yet he has been constantly at the proctor's office; he has been down to Oxford in search of Hone, and went with William Mynn to Winchester for the same purpose; nay, the proctor in the cause, who has been himself examined, says on an interrogatory: "Respondent was in frequent communication with George Whitehead, Whitney Milborne West, and William Mynn, who called almost daily at his office in respect to this cause;" and yet Dr. West says, "He has had no meetings with any person respecting it." To point out all the circumstances that induce me not to place entire reliance on Dr. West is unnecessary: but I shall advert to one or two presently.

The other two attesting witnesses are, Thain Wright and Robert Hone: and they are in direct contradiction to each other on several points; to which the Court is to give most credit, or whether much to

either, may be a matter not essential to be decided. Mynn himself has attempted to discredit Hone; but he is his own witness, and before he was produced, and when it was held out that he could not be produced, he was described as a highly respectable person; and anxiety was shown to plead his good character and handwriting. Whitehead, on the sixth interrogatory, says; "West acquainted him that Hone was a very respectable gentleman living upon his fortune." West deposes, that "he carried Hone with him on account of his respectability to witness the will." Yet he was not produced, and affidavits were exhibited to account for his non-production. And, on the 14th of November 1827, Dr. West and Thain Wright made oath, "that, in consequence of certain pecuniary transactions, Robert Hone left this country on or about the 22d of June last, and as they verily believe, has never since returned, nor do they know where or in what country he is at present residing." Stating, therefore, without reserve, that he had left the kingdom.

Considerable evidence has been gone into, in order to show that Mynn could not have produced Hone; and it was clear that he was embarrassed and in concealment: he had engaged in a joint stock company, and was liable to be made in some manner responsible for the engagements of that company; and he certainly wished to keep out of the way. Dr. West's expression is, "that he had absconded:" but that term is not very applicable, when it appears that Hone regularly gave up his house (at least his aunt's house), had his goods packed up by an upholsterer, Eaton, and laden in open day on a van; and that the same person, Eaton, was left as his agent to let the house. Hone himself was several times in town in July and August; he and his friend and solicitor, Norcutt, dined at West's on the 3d of August. Without entering into a detail of the circumstances (for after all it is but a subordinate matter,) the result on my mind is, that not only was there a want of due diligence used to find him, or to convey to him a letter, but that contrivances were used by Mynn's agents to induce him to keep out of the way, by holding out the terror of injunctions and legal proceedings against him.

The proctor, it seems, trusting entirely to Whitehead, West, and Mynn, took no steps to find this attesting witness; he did not go to Hammersmith, nor send a clerk; nor cause advertisements to be inserted. It does not appear that he even gave any directions as to the best mode of inquiry and the means to be used: he merely advised, and the advice was proper enough, "that every exertion should be made to find the attesting witness, as it would certainly be expected by the Court."

50. If this be the general mode of practice, I strongly recommend the introduction of a different system; and for these reasons. The proctor is the *dominus litis*—he is responsible to the Court for the purity of the proceedings—the interests of the suitor are intrusted to him—statutes have been passed to protect him in the exclusive practice of his profession—no person can use his name, nor participate in his profits. If the scene lies in the country, at a distance, it may be necessary to employ other agents—a country solicitor or some other substitute; but here, in London, or at a short distance, the necessary inquiries should not be devolved or intrusted to a Mr. Whitehead, or to a Dr. West, or a Mr. Mynn, who are to come daily to the proctor's office, in order to consult on the conduct of the cause; and who are afterwards to be material witnesses in the cause. If inquiries had been made of these persons, particu-

larly of Hone's friend, Dr. West, when he last saw Hone? Who was his agent and packed up his goods? Who was his solicitor? Dr. West must have answered, "I saw my neighbour Mr. Eaton, packing up Hone's goods in July, he himself was present; he and Mr. Norcutt his solicitor, were at my house and dined there on the 3d of August." Would it not have been nearly evident, that if a confidential letter had been sent either to Eaton, or to Norcutt, to be conveyed to Hone, stating the importance of his being examined, and that every precaution should be taken that his place of residence should not be disclosed, a communication might have been had with Hone.

I do not blame a young practitioner for not taking these steps; but if proper means had been resorted to, they could not have failed to trace Hone: Eaton and Thorpe both saw him several times between July and the beginning of August; they spent the evening with him at Mrs. Jefferson's on the 8th of August: Norcutt went with him to Winchester on the 9th of August: Hone was then uneasy about this will, and desired Eaton to call upon Mynn's proctor; and the fact is now admitted, that Eaton did call and left his card of address on the 24th of that month. It is said that it is not every card that would cause inquiry, but Whitehead had been there that very day; and this, when coupled with the entry in the office diary, "Mr. Eaton—Mynn v. Robinson," would almost necessarily lead to some investigation, whether Hone could not be found. From that entry it is clear Eaton did call, and about this very cause; though both the proctor and his clerks depose, that they have no recollection of any communication about Hone.

The accuracy of this evidence, "that they do not recollect it," cannot be doubted; but this only confirms the Court in the expediency of the improved practice just recommended: viz. that the proctors should themselves enquire about the witnesses; for if the proctor and his clerks had felt the duty cast upon them of finding out Hone, they would upon Eaton's coming from Hammersmith, where they must have learnt that Hone lately resided, and on finding that Eaton came about this cause and had left his card of address, have made inquiries at that time: indeed they would have made inquiries long before—whether he, Eaton, had seen Hone, and could give them any information about, or convey any letter to him.

The expression of Hone's uneasiness to Eaton, on the 8th of August, is in some measure confirmed by one of Mynn's own witnesses, Matanle, a solicitor, who, in October, mentions that Hone had declared "he did not see the deceased sign the will, and that he and Wright signed below stairs." It is pretty clear then, that these parties had fears about Hone's evidence, and had reasons for wishing to keep him out of the way: they considered him so far a person of respectability, that he would disclose the truth, however he might have been induced to set his name as a witness to this will.

There is another circumstance, respecting the mode of conducting the cause, to which I reluctantly advert; but it is impossible, consistently with my duty, to pass it over without observation. I mean the delay in the examination of the witnesses on the *condidit*: that plea is dated the 11th of July, and was admitted on the caveat-day, in August, yet the first witness was not examined till the 5th of November. The inability to find the third witness was no reason for postponing the examination of the other two; for Hone might possibly have appeared at any

time, and the previous examination of two would at least have expedited the matter, if attended with no other advantage: but the loss of time is, in this case, the least important part of the consideration. Here was a case, from the very import of the papers, of suspicious character; here were the party's brother and the two principal witnesses—the drawer, Whitehead, and the attesting witness, West—almost daily at the proctor's office. What could be more dangerous to the truth of the case and the purity of the evidence, than that these persons should be in this constant communication without being first examined,—should be endeavouring to see Hone, either to concert with him or to send him out of the way,—should be the agents, advisers, and conductors of the cause before their examination? No satisfactory reason has been, nor I think can be, assigned why these witnesses were not examined as soon as the *condidit* was admitted: their testimony would then have been much less suspicious: this delay throws a cloud over it.

Here are, for example, declarations not passing either at the instructions, or execution, introduced into the evidence of both these witnesses; and it may be much doubted, whether they would have found their way into their depositions, if none of these previous meetings had taken place. Whitehead introduces not only a declaration asserted to have been made in May 1827, but also one in November 1825, that the deceased “had made a will previous thereto and had left her husband every thing, but had burnt the same in order that her property should not go to those wretches, meaning some bill creditors.”

Now is this declaration true, or is it not true? Did the deceased ever make such a will? If she did, why is it not pleaded and proved? It was a will under a power; who made—who attested it? If she did make such a will, surely the husband must have known, and if he had known, it, it would have been pleaded and proved, because it would have laid a strong foundation for the present will, as reverting back to that disposition:—if no such will was made, either the declaration is the invention of the witness, or it shows the insincerity of the deceased in her declarations, and that she made them merely to please the friends and creditors of Mynn. There is no trace of any such former will, and this declaration must have been thrown in from considerations of what would be useful to the cause; and its introduction reflects great suspicion on the management of the business by the husband and his associates.

The same sort of circumstance occurs in West's deposition, which is to this effect: he sets out with stating, “that he became acquainted with the deceased about a twelvemonth prior to her death,” though he afterwards says, “that he was acquainted with her four or five years.” This shows that he deposes at random, and if his head and memory are so bad, how can the Court rely upon him for a single fact? He says, “he was consulted by the deceased, and prescribed for her during the illness whereof she died, and until a short time immediately before her death.” Again, this is not true,—he had ceased to attend her for many months, and Mr. White was her sole medical attendant.—West says, “he had seen and prescribed for her on the first of June; that she then related to him her anxiety and wish to make her will, and was determined to leave her husband all her property, as her brothers had refused her money of her own to give him; that a will had been prepared, by her directions, through her husband, which she was anxious immediately to execute, and that deponent should witness; but as she was then ill and much agi-

tated, the deponent said 'do not agitate yourself, leave that to a future day:' upon which she said nothing further on the subject."

Now I should have doubted this evidence much, even if the witness had been examined immediately, and had not been employed as an active agent in the manner he has been; but I suspect it much more when I look to this delay, and to the other circumstances of the case to some of which I must presently advert; nor indeed am I convinced that if he had been examined soon after the admission of the *condidit*, this would have formed part of his evidence.

For the sake, then, of general practice, and to protect the purity of proceedings—which is of importance more extensive than this individual case—I recommend that attesting witnesses should be forthwith examined, while the facts are fresh in their minds, and before false impressions can be made upon them: and further, that persons who are necessary witnesses, as attesting witnesses are, or any others who are intended to be examined, should not be employed as the advisers, agents, and conductors of the cause.

I come then to the account of the execution, and it is to be observed, that, on the responsive allegation, Mynn has introduced fresh witnesses to the execution; to previous declarations and to subsequent recognitions: particularly three servants—a footman and coachman who are still in his service, and a house-maid who lived with him some time after the deceased's death. It sometimes happens that fresh evidence, introduced to prop up a failing cause, only the more completely overturns it.

The coachman says: "The footman brought a message at six in the morning to get ready one of the carriage horses as soon as possible: Mynn came soon afterwards—he had never rode a carriage horse before: he said, he was going to Hammersmith—he should not hurt it—deponent let him out of the gates: it might be near seven o'clock." Here then was a sudden and hasty plan—nothing was arranged the day before with Dr. West; if he was there at all on the first of June.

Elizabeth Price, the housemaid, gives a very different account: "there was no haste, nor was it at that early hour—the deceased herself gave the directions:" she deposes to various previous declarations—that the deceased was quite alert, and that the matter was previously arranged: "two or three days before the deceased told her that West and two gentlemen were coming, and she was to show them into the parlour." Here is not one word of West being there the day before: "deceased told her this as she was in the bedroom dressing her." Not speaking of her as excessively weak, and confined to her bed: indeed, on the following article, she speaks to a recognition two days afterwards. "She was happy she had done what she said she would do . . . deponent was dressing her, was lacing her stays: the deceased did not, however, go down stairs for some time afterwards on that day." So that here is this poor woman, within a week of her death, dying of a cancer in the breast, up dressing, having her stays laced, going down stairs, though she had taken to her bed some days before, and was in her bed when the will is alleged to have been executed.

This is the sort of adminicular evidence produced. I cannot give much credit to this recognition; and I may as well now notice another, to which the footman is brought to depose on the day after the alleged execution: this witness says, "he met Mynn on the top of the stairs, who asked him to go into the deceased's room: deponent asked her how

she was—she answered, better; and added, ‘I have made a fresh will and left every thing to your master for his kindness to me.’” Now this story is not very probable, and I must consider it, in conjunction with other circumstances, before I can give it much credence.

To return then to the evidence of the execution: West, Wright, and Hone had arrived: Price told the deceased, that West and another gentleman were come: she seemed quite pleased; asked, “What sort of a gentleman?” It was a short stout gentleman: the deceased said, “she dared say it was Mr. Hone.” This was a lucky guess; for it does not appear that she had ever seen Hone, and his being brought is (according to West) West’s own act; and he admits “that Hone had never seen the deceased before the 2d of June,” and so says Wright. Price states, “she was then sent down to call up West: she went, delivered the message, and West went up alone, with papers in his hand. The deceased desired her to fetch a candle; she fetched it, placed it on the table; West was standing by the bed reading some writings out loud to the deceased, which he continued during all the time she was in the room; she seemed very attentive, laughed, talked to him, and seemed quite pleased while West read to her.” Now, West says, he did not read the paper to her; but how incautious it was, on the part of Mynn and of his advisers, not to have had the other witnesses up to hear this reading, and laughing, and talking, and to observe these pleasant feelings.

This witness, Price, states further: “West continued with the deceased no great while; he soon went down stairs: in not quite an hour afterwards, West, Wright, and Hone returned into the bed-room: deponent came out of the dressing-room and opened the door for them—they remained therein about half an hour—deponent went down stairs and saw them very soon after all come down stairs.” She adds, “When West was reading the will to the deceased, Mynn was down stairs with Wright and Hone: she heard him talking to them.”

It is difficult not to suspect that the whole of this is after-thought, fabrication, and falsehood: it is difficult to make a fabricated after-thought fit well in with a former fabrication: truth alone is consistent. Price’s account is materially different from West’s, and tends to throw an additional suspicion on the case. According to his story, there is not one word of Price’s coming down with a message from the deceased; Mynn is not left talking to Wright and Hone, but is up stairs in the adjoining room: West states that twice: there is no reading over. West not only does not mention it in his deposition, but on the thirty-first interrogatory he admits the negative. At first, on interrogatory, he had answered, “he had never seen the will before;” but afterwards he appears to have recollected what he had deposed as to his interview on the 1st of June, and corrects it by erasure and interlineation.

Now as to the date and sealing. West says, “he inserted the date;” Whitehead says, “it is in the handwriting of Mynn.” West says, “the seal was affixed in the adjoining room before the execution:” though he had said before, in chief, “that he had no recollection of the matter.”

Price says, “she carried the candle into the deceased’s bedroom.” Wright says, “he did not take notice of any seal when he attested;” Hone,—that “the seal was affixed below stairs.”

All these contradictions and variations raise a suspicion that truth is not at the bottom of this account; and, though I do not place any sort of reliance on any thing that Hone says, as forming the ground of my judg-

ment, it is some confirmation of his testimony that West himself admits, there was some sealing in the dining parlour, namely, the sealing up of the will in an envelope.

There is a still more striking contradiction to West, and in a circumstance that involves the whole transaction in still further suspicion. West states, both in chief and upon interrogatories, "that the deceased having signed the will, he carried it, so signed, down stairs, and that he and the other two witnesses returned immediately up stairs (not "in somewhat less than an hour," as Price says, but immediately:)" "that the deceased then, repeating after him, acknowledged the signature and published it as her will, and that he and the other two witnesses attested it in her presence and in the presence of each other:" he expressly says, "he attested it in the presence of the other two witnesses;" but Wright and Hone contradict this and assert, that when West brought down the instrument, both the deceased's name and West's were subscribed and the ink wet.

West then—the principal witness—the sole witness to the deceased's subscription—is directly falsified on a fact which could scarcely have escaped his attention, and respecting which he could hardly be mistaken through lapse of memory: he surely must be laid out of the case; not from this alone, but, from this and from a variety of other circumstances, he cannot be relied upon as to any one fact. Whether he did really go up stairs and the deceased, in the dying state in which she then was, did repeat these words of acknowledgment, or whether the witnesses signed below stairs, makes no great alteration, in my judgment, as to the insufficiency of the evidence. If Hone also is falsified, the case would rest upon Wright alone, and it would be impossible, under all the suspicions of this case, to hold his evidence sufficient. If the case was fair, why adopt this extraordinary mode of execution? It is not difficult to conjecture why West should write his name fresh before producing the will: it might induce the other witnesses the more readily to add their names to the attestation: but if they were really intended to be carried up to the deceased, why should either she or West subscribe the will in their absence? why should not they have heard the will read to her, when there could be no evidence of instructions proceeding from her? I cannot help thinking that the very proctor in the cause falsifies, in some degree, the story of West and Wright, or at least proves that they have given different accounts. They assert, that the deceased put her forefinger, or her hand on the signature, and acknowledged it to be her handwriting: that is the whole ceremony according to both their depositions; but the story which had been told to the proctor was much more formal, stating, among other particulars, that the deceased went over the signature with a dry pen. The two witnesses, however, mention nothing of the ceremony of a dry pen; they merely say, she touched it with her hand or finger: and yet, pretending that a dry pen had been used, might be material, and be a wilful though a false suggestion; for it would have shown greater alertness and activity on the part of the deceased both in mind and intention, and would also have shown her ability to write, and be a corroboration of West—the only witness to the signing. On the other hand, if she was not able to write, it accounts for Mynn and West going up stairs together, and then bringing down the paper, as if just signed by the deceased and West. The case is not wholly without evidence creating a suspicion of that kind; and some doubts may be enter-

tained whether Mynn and West went into the deceased's room at this time; whether they did not merely go into the adjoining room and then bring the will down with the two signatures with the ink wet, in order to induce Wright and Hone to add their signatures.

Mr. White, who attended the deceased at this time, and who appears to have given a very fair evidence, describes her state, and is entitled to much more credit than Dr. West, and the associates and servants of Mynn. He thus relates the condition of the deceased, and I see nothing to impeach his credit.

"From October, 1826, till her death, he was the constant medical attendant of the deceased: he frequently observed her very unhappy; and with spirits depressed; they influenced her general health:" he then speaks to her lamenting her husband's debts, and the harassing applications to her to liquidate them, and on the fifth article says: "She informed him she had, by will, secured to her husband an income which would render him independent; and that it was a very hard thing she should be so teased, considering the liberal provision she had so made for him." Here, then, is a complete recognition—in her last illness—of the will of 1826, and it corresponds with Lady Hunter's evidence, "that on the 4th of May, 1827, the deceased told her she had settled all her affairs."

The state, however, of the deceased's health is more completely spoken to by Mr. White, in his evidence on the thirteenth article. "During the last ten days of her life, in consequence of her bodily powers having become very much worn down and enfeebled, she continued in bed." Yet, two days after, Price says, the deceased was up, and being dressed. "Her right arm was almost completely paralysed; and her hand and fingers so swollen that for several weeks before, and to her death, she carried the same in a sling: deponent saw her write a cheque with the greatest difficulty: after that the powers of her arm became much more diminished; but her mental powers continued unimpaired to the last day he saw her, and this was the day before her death. When Mynn returned home from the King's Bench prison her recovery was hopeless: her death might have happened at any time."

This state then of her mental powers renders it not impossible that Mynn and his agents, in respect to this paper, did not venture to have any communication with the deceased, lest she should refuse, if not overcome with pain, and laudanum, and extreme weakness, to express an acquiescence and repeat the words dictated: but, considering her extreme debility—the pain she was enduring, that she was taking laudanum to lull it; in the hands of this husband if she did acquiesce so far as to repeat, after West, the acknowledgment of the signature and the words of publication, it would not prove satisfactorily that she had even subscribed the paper—much less approved it: and looking to her bodily infirmities,—that for the last ten days she had been confined to her bed; that her right arm was almost in a state of complete paralysis: that the hand and fingers were swollen, so that, several weeks before, she had great difficulty in signing a cheque, and that afterwards the powers of the arm became much diminished; yet seeing with what alertness West describes that she took the pen and made the signature; seeing how well the signature is written, (for the names, particularly Mynn, are written freely and well), and finally, that the attesting witnesses—two of them

at least—do not see her sign, there is but too much reason to doubt, whether this is a case of a mere failure of proof.

At all events the evidence is not sufficient, in my judgment, to enable the Court to pronounce for the validity of this will; and, as the husband was the conductor of the transaction, and had resorted to such a mode of getting this paper drawn and executed, it is my duty to accompany the sentence, pronouncing against the will, with a decree condemning Mr. John Mynn in the costs.

MILLER and ROSS v. BROWN.—p. 209.

A widow having, after the death of her husband, delivered a will made during coverture to her executor for safe custody, such delivery, coupled with other recognitions, amounts, in a Court of Probate, to a republication, rendering it a new will of which the executors are entitled to a general probate.

A formal republication is not necessary in personalty, as to which no publication is necessary.

THIS was a business of granting probate of the will of Harriet Miller, widow, and was promoted by two of the executors against a brother of the deceased (also an executor) and a party entitled in distribution in case of an intestacy. The will purported to dispose of real and personal property; it was made during coverture, but by permission of the husband, who was acquainted with, and approved of, its contents: he died on the 16th of December, 1825: and his widow on the 11th of September, 1827. The evidence fully established,—that after the death of her husband, testatrix frequently recognized this instrument as her will; expressed her satisfaction that it was made; and that, in June, 1827, she delivered to one of the executors a tin box, which she informed him contained her will (and in which it was found after her death), and on the evening of the day on which she so left the tin box, she declared to Dr. Chichester, a physician, whose daughter was married to the executor referred to, “that she had that day deposited her will with him.”

The *King's Advocate* and *Haggard*, in support of the will.

Lushington and *Pickard*, contra.

JUDGMENT.

SIR JOHN NICHOLL.

The deceased was a widow at the time of her death: and whether this will refers principally to real property is not for me to inquire. It has been said, that it is necessary to show a republication after the husband's death, *animo republicandi*: it would be a strange doctrine for this Court to hold that a formal republication is necessary for a will of personalty where no publication is necessary: custody is a sufficient publication of personalty. What has been done here is quite sufficient. Dr. Chichester speaks to a very strong act of recognition, which, as far as concerns this Court and a disposition of personal property, is a sufficient republication. The deceased (within three months of her death) brought the will sealed up and deposited in a tin box, which she delivered to one of her executors for safe custody, and so it remained till her death, and was then found. The answers, too, admit the depositing and finding.

This is a republication to all intents and purposes, and the instrument

so delivered becomes a new will: there cannot be the slightest doubt as to what her mind and intention were; she did not consider a formal republication necessary, but she adhered to the disposition.

What effect this paper may have upon the real estate it is not for this Court to determine, but it is clear that the executors are entitled to a general probate.

The costs may be paid out of the estate.

2 E. 2. 289. MACKENZIE v. HANDASYDE.—p. 211. 558.

75. a. Where the execution of a codicil was clandestinely, and without previous instructions, obtained—from a testator of eighty—only one month before death, by the son—the person solely benefitted—and his associates, the disposition being contrary to the repeated former acts of the deceased, the clearest proof of capacity and free agency is necessary. Codicil pronounced against, and the son condemned in costs.
213. A testamentary instrument may be established against the evidence of all the subscribed witnesses, but such a case would require to be supported by the whole *res gesta*, by strong probability arising from the conduct of all parties, and by the improbability of the practice of fraud, circumvention, or undue influence.

PETER HANDASYDE, died on the 20th of November, 1824. In the following month, Thomas Handasyde, the son and sole executor of his will, took probate thereof and of a codicil. In Easter term, 1827, a decree “to bring in the probate” was served upon the executor at the instance of Allan Mackenzie, whose legacy, under the will, was revoked by the instrument proved as a codicil. The will was dated on the 7th of September, the codicil on the 21st of October, 1824. The codicil alone was opposed.

The *King’s Advocate* and *Addams*, for the codicil.
Lushington and *Dodson*, contra.

JUDGMENT.

Sir JOHN NICHOLL.

The deceased was originally a common soldier, but by merit raised himself in life, and became Sergeant of the 45th Regiment. In 1795, he was appointed barrack-sergeant at Porchester, at which time Mr. Mackenzie, the party in the suit, was barrack-master. In 1810, on a memorial of his services being presented to the commander-in-chief, he was rewarded by an ensign’s commission in the Veteran Battalion, went on service to Gibraltar, and returned in 1814. He was then appointed to the First Royal Veteran Battalion, which he joined at Plymouth, and there he remained till the regiment was disbanded in 1816. In that year he married Miss Murray, his second wife, who died in May 1823. In August the deceased removed to Hilsea, where he resided for some time with Mackenzie; and he afterwards removed to a small house next door, in which he died on the 20th of November 1824.

While the deceased was barrack-sergeant at Porchester, a great friendship was formed between him and the barrack-master, Mackenzie, notwithstanding their disparity in rank; and this mutual attachment continued till the death of the deceased. How far Mackenzie was instrumental in procuring his commission, does not appear, but it is pretty evident that he assisted the deceased with money to fit him out for Gibraltar in 1810, and on the death of his second wife, it was to Mac-

kenzie's house that he retired; he was an inmate there for some time, then took a house next door, and, in two wills now exhibited, his friendship and obligations to Mackenzie are expressly recognized; and there is no suggestion that any quarrel or misunderstanding had arisen between them.


The deceased by his first wife had an only child—a son, but for many years was alienated from, and kept up no intercourse with, him; but the grounds of that alienation need not be inquired into: on the death of his second wife, in 1823, the deceased did not even know where to find this son; he did, however, at length discover him, and a reconciliation took place: whether this was chiefly brought about through the intervention of Mackenzie is not very important; but it is certain that Mackenzie went to London with the deceased, and that the son and his wife came down to reside with the deceased at Hilsea. On one side it is alleged, that there were subsequent disagreements; on the other, that the son and his wife were most attentive, and that the deceased was very fond of them. It comes out, however, from the son's own witness, Mary Thompson, "that the son and his wife had frequent quarrels, which often proceeded to high words, and once even to blows. On one occasion the deceased took part with the wife, and his son left the house, but a reconciliation was brought about and in a few days he returned." Here then, on one side, are long and uninterrupted friendship and gratitude to Mackenzie, down to the very time of the deceased's death: on the other side, towards the son, long alienation of affection, reconciliation in 1823, and a residence together—but not quite in unbroken and increasing amity and regard.

I shall next look to his testamentary acts. In February 1824, after the son and his wife had resided with the deceased for some months, when the reconciliation and attention had had time to operate, still he made a disposition, in substance, as follows: He gave Mackenzie 1000*l.* sterling—his own son, the dividends of the residue for the use of himself and of his wife, with an absolute power of disposal to the survivor: he also gave his son the household goods, and appointed him and Mackenzie joint executors. The son, then, had only the interest for life in about 3000*l.*, the amount of the residue, unless he survived his wife, who was placed on an equal footing. The bequest to Mackenzie commences in these terms: "To my benefactor and highly esteemed friend." It is useless to inquire the extent of Mackenzie's assistance in obtaining the commission and fitting him out for Gibraltar, in 1810: here was a solemn recognition by the deceased of the obligation in this very instrument, fourteen years afterwards: and, what renders it more strong, this will was made not only several months after the son and his wife had resided with the deceased, but they knew of the instructions; were actually privy to, and present at, the execution of the instrument; and were acquainted with its contents. This will also marked the continuance of his want of confidence in his son, and a wish to protect his wife; for Mr. Mackenzie was joined in the executorship, and she was nearly as much benefitted as this son, and had the absolute disposal of the residue, if she survived her husband.

The son was dissatisfied with this will, and used his best endeavours to get it altered (and this may account for his apparent attention to the deceased at the time): he did at last succeed to a certain extent, and a new will was made, but in a very suspicious manner. The deceased,

now in his 80th year, was rapidly declining of mere old age; and about seven months after the former will, and two months before his death, this new will was obtained: not by employing the same solicitor, not with the privity of Mackenzie; but the son, Thomas Handasyde, provided an attorney from Portsmouth, and a friend from Portsmouth, to manage this second will. It is not, however, necessary to enter into a detail of the circumstances attending the *factum* of this will, as its validity is not in question. But to what extent does it vary from the former will? Its substance is shortly this: It bequeaths 1000*l.* 3 per cent. stock, instead of sterling money, to Mackenzie; but there is still the expression, "in testimony of my gratitude for past services and benefits he has done and bestowed to and upon me;" here therefore is still the strongest recognition of his obligations to Mackenzie. This will, however, has other alterations. The son's wife is excluded from any interest in the residue; the son takes it absolutely, and is appointed sole executor. Yet his own evidence shows, that the daughter-in-law was the deceased's favourite; he took her part in the conjugal quarrels; but now she is wholly passed over. This will, as I have said, is not opposed: but it has much the appearance of being the act of the son, and not of the father. Yet this was the highest point to which Thomas Handasyde could carry the alteration of the disposition by this instrument of September, after seven months' dissatisfaction at the former will: and so long as the deceased had strength and firmness to resist, the total exclusion of Mackenzie could not be effected. Still, in six weeks after this second will so strongly acknowledging his gratitude to Mackenzie, without the least appearance of a quarrel or dissatisfaction, was the codicil in question in this cause made, revoking the bequest to Mackenzie altogether. It is in these terms:—

"This is a codicil to the last will and testament of me, Peter Handasyde, which will bears date the seventh day of September last past, and in and by which I bequeathed to my friend, Allan Mackenzie, the sum of 1000*l.* stock, part of 2,350*l.* stock which I now have and then had in the three per cent. Bank annuities. Now, upon consideration of the affluence of my said friend, and that I ought in justice to consider the interests of my son rather than a stranger in blood, I do hereby absolutely revoke and make void the said bequest, and do declare that my said only son, Thomas Handasyde, shall have and receive in the nature of a bequest or legacy the said sum of 1000*l.* stock, and also all and every part of my estate and effects whatsoever, which I am now or may be possessed of or entitled unto at the time of my decease; and I hereby declare this to be a codicil to my said will, and recognize and again appoint my said son Thomas Handasyde as the only sole executor as well of the said will, as of this codicil thereto. In witness whereof I have hereunto set my hand, this twenty-first day of October, 1824.

"The mark  of
Peter Handasyde."

"Signed by the said Peter Handasyde affixing his mark hereto, after the same being fully read over and explained to him, (he then being in sound mind and perfectly aware of the nature of the codicil, but by old age and affliction unable to write distinctly,) in the presence of—

"S. Blyth, Geo. Vicat, John Williams."

This codicil is executed by the mark of the deceased, though he had

signed his name to the will, and the attestation clause is totally different from the usual one. This, so far from assisting the paper as evidence of the fairness of the transaction, shows to my mind some doubt as to the deceased's capacity: and what are the alleged grounds of revocation? Mackenzie is still recognized as his friend, and the reasons assigned respecting his "affluence" and his being "a stranger in blood" existed in February, and September, when the testator was much more competent to decide on the weight of those considerations. The deceased had now taken to his bed, was within a month of his death by decay of nature, and was so weak in body as only to be able to make a scrawling mark; he was scarcely able to resist importunity, or to form any sound judgment for himself.

On the face then—on the very surface of the transaction—the affair is suspicious, and with the admitted dissatisfaction of the son at both the wills—the last only executed six weeks before, by which the change in Mackenzie's legacy from sterling to stock was made, the Court would require the clearest possible evidence of the *factum* of this codicil. It is attested by three witnesses, Blyth, Williams, and Vicat. Blyth, the attorney and drawer, is since dead, and his death, character, and handwriting, have been pleaded. The evidence to his character is somewhat conflicting: there are several witnesses who give him a very good character; but the fact is clear, that he was rather in low practice, was chiefly concerned for prisoners and smugglers, kept no office, nor clerk, became an habitual drunkard, and died in consequence of his intemperance, having first become insane: he was not of that high character in his profession as to give a strong assurance, that he had not lent himself to, or at least been surprised into, the making of this codicil under the directions of Thomas Handasyde, without sufficiently ascertaining that it was the free and voluntary act of a capable testator.

The other two witnesses have been examined, and if they are credited, it was merely the act of the son; they entertain at least strong doubts of the capacity of the deceased. These witnesses are deposing against their own act, and are to be heard with considerable caution; if fully believed, there would at once be an end to the case; it would be a great and manifest fraud. It is possible, that a testamentary instrument may be established against the evidence of all the subscribed witnesses; but such a case would require strong supplementary circumstances—would require to be supported by the whole *res gestæ*—by strong probability arising from the conduct of all parties,—and by the improbability of the practice of any fraud or circumvention, or the exercise of undue influence.

Both these witnesses have been making applications to Thomas Handasyde, as they suggest, for promised rewards. From that circumstance two inferences may be drawn: they probably have not disclosed a fraudulent transaction from honest compunction of conscience; but, on the other hand, if the transaction had been fair, would they have made these applications? At all events, if they are discredited they make no proof of the *factum*—that must be established by other evidence: but the *res gestæ*—always a strong species of evidence—are all against the probability of the act.

These witnesses are the friends of Thomas Handasyde, brought by him from Portsmouth wholly without the knowledge of Mackenzie: in the next place, it is a night transaction—Blyth had gone to the Winchester sessions; he was way-laid, waited for on the road at his return,

and carried to the deceased's house, where the codicil was prepared and executed between 8 and 11 o'clock at night. Blyth had dined with a friend on the road; he might have been rather elevated, for he had no objection to indulge a little freely in liquor; but it does not appear that he was intoxicated: and there were refreshments at the deceased's after the business was over. If the deceased was so willing and so capable, where was the necessity for such haste? It is not stated, that he had any sudden attack. Why not wait till the next day, and let this codicil be made in broad day-light? Abundance of persons, competent to attest, were close at hand. Why not call in the medical attendant or respectable neighbours? Why has it been necessary to resort to declarations either before or after, and to opinions upon capacity? Witnesses so easily mistake times and dates, that some of the declarations may possibly apply to the will of September. The transaction being so manifestly conducted by Thomas Handasyde and his associates, the disposition so contrary to the former wills, and to the very recent will of September, it requires the clearest proof both of capacity and free agency.

There is a piece of evidence, introduced on the part of the son, to which it is necessary to advert, though I notice it with extreme reluctance. The curate of the parish attended as a clergyman on the deceased, who was a devout, conscientious man, and was desirous of receiving the sacrament; but he being in this weak state, the curate thought it proper, before administering the sacrament, to undertake, upon the representation of Mr. Handasyde, to interfere about this will in the following manner. "The deponent was informed by Mrs. Handasyde, that the deceased was distressed in his mind on account of his will made, in some measure, in favour of Mr. Mackenzie." He does not, however, on this ask the deceased whether he had any distress of mind on such point: but "he told the deceased, it was essential his mind should be quite free before he could receive the sacrament; and asked him what had occurred on his son's part to prevent his leaving his property to him? The deceased spoke of his son having been somewhat wild formerly. But on deponent's talking further with him, and pointing out to him that it was his duty to take care of his only child, the deceased made up his mind to do so; at least the deponent, after having administered the sacrament to the deceased, which he did when he had ascertained his mind was in a fit state to receive it, and free from distress, left him with a firm impression that he intended to leave the property which he had given to Mackenzie, to his son; and that his mind was relieved by that resolution: this must have been before the 25th of October." Here, then, was this pious man, so ill that the sacrament was about to be administered to him; but, under a supposition that he had left his property from his only son to a stranger, the witness undertook to determine that his mind was not in a fit state to receive the sacrament till he had acquiesced in the propriety of altering his will. It also appears from the answer of this witness, upon interrogatory, that "in the summer of 1824, Thomas Handasyde and his wife called upon, and asked him to interfere with the deceased on account of the will in favour of Mackenzie: they complained of the deceased's partiality for him: the respondent declined interfering." Here, then, both the son and his wife apply. "Respondent did express his surprise, as interrogate, that Mackenzie should want any money from the deceased's estate, when there was barely enough for him to leave his son." But how did he

know all this; and why did he afterwards interfere on grounds of this kind? I am of opinion that this was a degree of influence and importunity that the deceased was not, at that time, capable of resisting. He might have a testable capacity, but that will not meet all the demands of the law, and supply the want of evidence of instructions, and overcome all the difficulties and suspicions under which this codicil labours. As to the refusal of the sacrament, what importunity, what influence could be more undue?—even assuming that all which occurred is correctly related, and with the true colour, though that may be doubted; for the fact is not expressly pleaded so as to cross-examine to it. Suppose this gentleman had been told, as the real fact was, that this bequest to Mackenzie was a mere debt of gratitude—that he had so recorded it in both his wills, (the deceased might perhaps think, that had he not experienced the kindness of Mackenzie, he might have had nothing to have given this son) could his interference have been justified? Or if this fact was concealed from the curate, such concealment was an imposition practised upon him. But, on the other hand, suppose the deceased had left every thing to the son, and Mackenzie had induced this clergyman to interfere and get him 1000*l.* legacy by a codicil, telling him—that till he had discharged the debt of gratitude he owed Mackenzie “his mind was not free”—“was not in a fit state for the holy sacrament;” what would have been said of a codicil so obtained by Mackenzie?

The state of firmness of the deceased’s mind at this period could not have been great; for the curate states, that after the conversation to which he has deposed, he never went to the deceased again. His evidence, then, does not give a more favourable impression of the case: at all events it will not supply the proof of the *factum*—the continuance of intention, and capacity: it goes no further than to show, that at one time (whenever it was) the deceased, under the pressure of this improper interference, seemed to acquiesce.

There is a recognition relied upon, and spoken to by Mrs. Robertson, an old markswoman of seventy-five; and there is also something of a recognition deposed to by Mary Thompson, the nurse: but the Court cannot rely much on their recollection of declarations made three or four years before, nor of the time at which they were made, nor of the transaction or instrument to which they might apply. They are not sufficient to counterbalance the other defects.

A codicil, then, obtained under circumstances already adverted to, and so completely opposed to the repeated acts of the deceased, when of sound and perfect mind, requires evidence going much more directly to instructions, to volition, and to capacity. The son, after seven months’ dissatisfaction at the will of February, though he was privy to its *factum*, could only, in September, get the deceased to reduce the mark of gratitude to his friend from sterling money to stock; and that will has every appearance of being the deceased’s ultimatum.

When, however, the Court sees, after this old man, in his 80th year, had taken to his bed, the son, by himself and his friends—by a minister of the Church—holding out, in effect, excommunication to this pious old man, if he left this token of gratitude to his benefactor, instead of leaving every thing to his son; when it sees also the son getting these associates of his own from Portsmouth in the night, in such haste as to watch Blyth’s return; and procuring the execution of this codicil by a

mere mark without any respectable and disinterested person being present; it cannot but hold, that this conduct and the whole transaction bear such strong marks of unfairness, and are exposed to such strong suspicions of fraud, that it must pronounce against the codicil: and I hardly think the Court would be doing justice, and using sufficient endeavour to prevent similar applications when parties are in this condition, if it did not accompany that sentence with a condemnation of the son in costs.

BARWICK v. MULLINGS and Others.—p. 225.

- 1st. A paper—commencing “Memorandum of my intended will,” but dispositive in terms—signed, and intended to operate if no more formal will was made, is, unless revoked, entitled to probate.
 2d. Neither instructions, nor a will drawn up therefrom (which, though in the deceased’s possession for several months, was not executed nor shown to be finally determined on) will, either as entitled to probate or as letting in an intestacy, revoke such a paper.

Lushington and *Pickard*, for paper No. 1.

Dodson and *Nicholl*, in support of paper A.

The *King’s Advocate* and *Phillimore*, on behalf of the widow, and for an intestacy.

JUDGMENT.

Sir JOHN NICHOLL.

In this case there are three parties before the Court: first, William Barwick, a nephew and one of the residuary legatees in the paper which he propounds, marked No. 1; secondly, Phoebe Barwick, a niece and executrix in a paper of a former date, marked A, which she propounds; and, thirdly, Hannah Mullings the widow, who opposes both, and contends for an intestacy.

The deceased, Joseph Mullings, died on the 16th of November 1827, and left a widow, a sister, and four nephews and neices entitled in distribution. His property, which is all personal, was nearly of the value of 11,000*l*.

Of the papers propounded, paper A, the earliest, begins: “This is a memorandum of my intended will;” but it goes on throughout in dispositive terms; it appoints executors, is dated and signed by the deceased himself, and the character of the signature is different from that of the body of the instrument.

In legal consideration, this paper upon the face of it, being subscribed by the testator, would be a finished and perfect paper. The subscribing it would be *prima facie* evidence that the deceased intended by that act to give it effect; and that, though he began it as a memorandum, yet as he went on to use dispositive terms and finally signed it, he altered his mind and converted it into an operative instrument; more especially as the body of it is not in the handwriting of the deceased; so that the signature could not have been carelessly and thoughtlessly added, but intentionally and upon consideration; nor is there any thing to show that he intended to do any further act to this particular instrument. Still the term “memorandum of my intended will,” would raise a sufficient doubt to let in evidence of circumstances, whether it was finished

in order to have effect, or only as a deliberative memorandum.(a) Parol evidence then being let in, the history of the deceased and of this paper may give to his intentions a more decided character.

The deceased had been a butcher, but was retired from business: he was married to his second wife, and had been in that state for about sixteen years; but it is impossible to describe his life as the happiest state of connubial bliss, for he and his wife did not live on the most harmonious or comfortable terms together. It is clear that he had no thought of dying intestate; the instruments propounded as well as the parol evidence establish that fact beyond all doubt: he was aware that under an intestacy the law would give his widow half his property absolutely, and he was determined to guard against that course of distribution: he had a sister living who had children, he had also other nephews and nieces; and he meant therefore to provide for his wife by what he considered a handsome income for her life, but on her death to divide the bulk of his fortune among his own relations: he seems also to have been aware, that his wife had the same knowledge of the distribution which the law would make, viz. that she, as widow, would take half absolutely; while she appears to have differed entirely from her husband in opinion, that a mere life interest in the produce of that moiety would be a handsome provision for her: she preferred the moiety absolutely, and entertained no great hopes that a testamentary distribution by the husband would be more favourable, or even as favourable, to her as that disposition which the law would make.

In this state of opinions the deceased apparently thought, that it would tend much to domestic peace, if, in whatever testamentary arrangement he might wish to make, the act were done without the privity of his wife. Mr. Richard Barwick, who had married the deceased's sister, was much in his confidence, was consulted by him frequently upon the subject, but always when Mrs. Mullings was not present, and if she approached the conversation was dropped. The deceased and Barwick used often to go out together in the deceased's gig on a Sunday—the only day when Barwick was not engaged—and it appears, that according to an arrangement between them, on the first Sunday in April 1820, they met at the house of Barwick, where by the deceased's instructions, and in his presence, he wrote paper A: and the deceased read it over, approved of it, and signed it; it was then sealed up in the deceased's presence, who desired Barwick to keep and take care of it:

Now, if the parol evidence stopped here, and if the deceased had died the next hour, or the next day, there can be no doubt that this instrument would have been valid: but further, a presumption of abandonment would not attach to it; the instrument was not unfinished, the deceased intended to do no more in order to give it effect: it was signed—sealed up—and deposited for safe custody in the hands of one of the executors. Even if the deceased had at this time expressly declared that he intended to have a will formally prepared, still this paper would be deemed his will till he had executed a more formal instrument, however long delayed; in addition, however, to the evidence that he did not like the trouble or expense of making a formal will, the deceased, shortly after its execution, strongly recognized this instrument as his will. Unless therefore there be some act of revocation, paper A will have operation.

(a) See *Mitchell v. Mitchell*, *supra*, p. 29.

Thus matters remained till 1826: when Barwick, by the deceased's desire, brought A in his pocket, and in the course of one of their drives the deceased said, he wished to read it and make some alterations therein: the seal was broken and the will read both to, and by, the deceased. He said, "It was not to his mind, and that he thought of making an alteration;" but he did not say what alteration, nor can Barwick recollect whether this was before or after some offence which Joseph Fanthorn, his nephew, had given the deceased while living in his service; he rather thinks before; nor did the deceased appear to have made up his mind respecting the alteration, nor specify whether it was trifling or considerable, only that it was some alteration. The will was returned to Barwick, and they agreed to confer again upon a future Sunday. They did accordingly consult, and after that second conference, the deceased took the will with him, kept it two or three days, then left it with Mrs. Barwick, and subsequently told Barwick, "he was afraid Mrs. Mullings should get hold of it:" and it remained in Barwick's hands till after the deceased's death.

Here, then, after six years, was not only adherence to, but a complete demonstration, of confidence in Barwick and confirmation of this instrument; he treated it in every respect as his will; he talked indeed of making some alteration—what, he did not state; but after repeated perusals and considerations he again deposited it with one of the executors. In point of legal validity this instrument, though described at the outset as a "memorandum," but being testamentary in terms, then signed, thus deposited originally, thus revised and reconsidered after six years, thus again deposited, is as much to be considered the will of the deceased as to his personal property (and he had no other,) as if it had been executed and attested in the most formal manner: it was his will till he had altered or revoked it by some other valid instrument.

The question then comes to the validity of the other papers propounded: for intestacy seems quite out of the consideration; it would be as much against the manifest wishes and intentions of the deceased as against legal construction.

The matter rested till the spring of 1827, when the deceased and Barwick had further conferences, and Barwick sketched him out a sort of skeleton will, leaving blanks to be filled up with the description of persons and premises. This paper he left with the deceased; at the same time advising him to apply to a professional person and recommending Mr. Collingwood. From this paper, or in some way or other, the deceased himself wrote No. 1, the paper propounded by William Barwick, but the skeleton will drawn up by Richard Barwick has not been produced, and was probably destroyed by the deceased, when he had written No. 1.

This paper is hardly intelligible; it has no date; it has executors, and the disposition made by it varies a good deal from the former, and is more favourable to the Barwicks, more unfavourable to the Fanthorns, Joseph Fanthorn having only a legacy of 50*l.* instead of 50*l.* a year: but still it adheres to the intention of providing for the widow by an annuity of 250*l.*, though a house and a legacy of 100*l.* are given her in addition. This paper, thus drawn out in a most insufficient way, the deceased, in May 1827, carried to Mr. Collingwood as instructions. Like A, it contained no disposition of the residue—that was only added by Collingwood after conversation with the deceased; and no executors were named

—at least none are written down. Collingwood details what passed upon the occasion of the deceased's coming to him, "That the deceased came alone—in the morning—professed to be in a hurry—delivered to him No. 1, as instructions for his will—they were read over to him—the necessary alterations and additions made, and the interview lasted about half an hour, but there was no lengthened conversation—the deceased being impatient to go."

It was in this hurry that he gave these imperfect instructions; and this was the only communication that he had with Collingwood as to the contents of No. 1, and it is from this interview that the Court is to decide that No. 1 is the last will. What might be the effect of Collingwood's evidence if no former will existed and the deceased had died immediately, with strong circumstances to support the intention of the disposition thus made, is not the question for my decision, for there is a former will long adhered to and confirmed. He had some misunderstandings with parts of his family—with his nephews William Barwick and Joseph Fanthorn—before these instructions were given: that with William Barwick, the father admits to have been temporary; and between these instructions and his death, he may have thought less unfavourably of Joseph Fanthorn.

Mr. Collingwood, as I have said, had no second interview with the deceased respecting these instructions, but from them, given in a hurry (and it might be under a temporary impression,) the draft of a will was prepared, and an engrossed copy sent to the deceased ready for execution. The fair copy varies in several respects from the instructions, and is of considerable length, being no less than thirteen sheets of paper. It was given to the deceased on the 29th of May, and remained in his possession till the time of his death, on the 16th of November, but no execution took place, nor any thing tantamount to it. Collingwood frequently saw the deceased—asked him when it should be finished—pressed him to bring it to a close—but he could not prevail; he never obtained even a declaration that he had read and approved it: all he got were complaints of its length, or, as the deceased expressed it, in language not very inappropriate to his condition of life, it was "gallows long."

To his friend Barwick he disliked the phraseology, "there were so many 'aforesaid's:' he could not understand it, it puzzled him." Barwick offered his assistance to explain it,—he read part—but there was no direct approval:—the fact is, there are marks, some of which show that he thought it incorrect in parts, and wished it altered in other parts—and he declined to execute, for so the non-execution must be considered; since if it was only reluctance arising from a difficulty of understanding it, he would have gone (for he was well enough) to Collingwood and obtained an explanation: the expense had been now incurred—that could not be the objection.

Against this conduct it would not be possible for me to decide that he quite approved of the disposition: might he not begin to doubt and hesitate as to the propriety of executing it? He was taken ill—the instrument was in the room—he saw Barwick—he frequently was alone with his apothecary—still he took no steps to execute. The evidence is pretty strong to show that the wife gave no great facilities for making or completing any testamentary disposition; but there is no evidence, on the other hand, in any degree satisfying me that the deceased now wish-

ed to execute this will making the exact disposition of property it contained: he desired to see Barwick—he wished to see Collingwood—he was in possession of his understanding, but *non constat* that he did not intend to make alterations in this instrument, which for six months he had declined to execute, though reminded and requested by Collingwood and urged by the approach and continuance of illness. It is true that Mr. Collingwood says, “he has no doubt, that No. 1, as altered by the deceased on his interview with him on the 21st of May, contained the testamentary intentions of, and was fully approved by, the deceased:” but this conversation six months before his death, was hurried—he might have changed his mind: and this does not quite rest on inference and conjecture, for there is direct evidence that he did wish alterations in that paper, in order to assimilate it in some degree to the disposition under A., particularly in favour of Fanthorn, towards whom—after time, the great softener of resentments, had elapsed, and when from the reflections of a sick bed and the approach of death his heart would naturally relent—he might feel forgiveness, and wish to bestow upon him a larger share of his property than he proposed in No. 1. That within three days of his death, he contemplated some alteration favourable to Joseph Fanthorn, and that he wished to see Barwick about settling his affairs, is deposed to by Parrett, who was attendant on the deceased as his nurse: and her evidence is confirmed by a note she wrote, upon the occasion of his conversation with her; which note she delivered to Barwick, on the evening of the same day: so that her account is no after-thought; she acted upon it at the time; and there is no reason to doubt its truth, for it accords with probability, with the evidence of the boy, M'Duff, and with the conduct of the deceased in not executing this will.

Under these circumstances it would be contrary to all the principles of this Court to pronounce for No. 1.—there being no reason to suppose that imperfect paper contained his final intentions. The case therefore reverts back to paper A. That instrument, having been signed, approved, revised, confirmed, restored to its former custody, and adhered to for so many years, and containing a disposition conformable at the last to the deceased's intentions—he being determined to die testate; to provide for his wife by this annuity of 250*l.*; to leave the bulk of his fortune among his own relations; and reverting to his purpose of including Fanthorn in his bounty (whether or not with any slight alterations cannot be ascertained)—I am of opinion that, till any meditated alterations had been legally and effectually made, paper A. was to be esteemed the will of the deceased, and must be pronounced for.

Lushington, moved the Court to decree William Barwick's costs to be paid out of the estate.

Per Curiam.

Though there was a “*justa causa litigandi*” in William Barwick, it does not follow that he is entitled to his costs out of the estate: however, upon the whole, thinking that it was necessary for him to bring the matter before the Court, I will allow his costs out of the estate: but the widow certainly is not entitled to any indulgence. The party, who has established paper A, will of course take her expenses out of the estate.

MASTERMAN v. MABERLY.—p. 235.

Where a testator executed a will and two codicils, and afterwards had a new will and certain bonds prepared which were, in conjunction, to dispose of his property, on the same principle as his former will, and died when preparing to sign the new will, first, the execution being thus finally determined on and prevented, the new will is entitled to probate; and secondly, the new will never being intended to operate independent of the bonds, the Court is bound, in order to carry his intentions most nearly into effect, to grant probate of the new will and of the unexecuted bonds, as together containing his will; and to revoke a probate of the former papers.

Where there is final intention proved and execution prevented by the act of God, the mere want of execution does not invalidate an instrument disposing of personality. The disposition has the same legal effect, as if the instrument had been actually signed and attested.

When a paper is not intended as a will, but as an instrument of a different nature, if it cannot operate in the latter, it may in the former character; for the form does not affect its title to probate, provided it is to carry into effect the intention of the deceased after death.

THE deceased, William Leader, died on the 13th of January, 1828. Of his will and two codicils, respectively bearing date the 2d of August, 1826, probate had been taken by the four executors therein named: this probate was called in for the purpose of trying the validity (as testamentary instruments and, as such, whether entitled to probate in conjunction with the will and codicils already in operation) of a will, regularly and formally prepared, and of three draft bonds. These four instruments were severally engrossed in 1828; but were all unexecuted. In the unexecuted will, William Leader Maberly was substituted in the place of his father, John Maberly, an executor and trustee under the testamentary papers of 1826: the other three executors were retained.

Lushington and *Pickard*, in support of the unexecuted will and bonds.

Testamentary papers, of which the execution is only prevented by death, are as much entitled to probate as instruments duly executed. Here final intention is proved, and the deceased died in the very act of execution. An union of executed and unexecuted papers is not unusual.

Per Curiam.

Is there any instance where two papers—both complete as to the disposition of personality, and where the only defect of the second paper is a want of due execution—have been admitted to probate as together containing the last will? Such a case is not within my recollection, and seems contrary to the principle upon which two papers are incorporated for the purpose of probate. The practice of taking two papers as together containing the will, is, in strict principle, for the purpose of supplying imperfections in the disposition of personality by the latter paper: though, perhaps, for the convenience of parties it may be extended to cases where a latter paper, the execution thereof being prevented by the arrest of death, operates as to all the personality; but not as to the realty which would pass under the former executed paper. Where a subsequent paper is merely codicillary then no difficulty arises.

Argument resumed.

The object of this Court is to effectuate intentions. In the present case, probate of the unexecuted instruments would certainly most fully attain that object; but, the question is, whether the Court can grant probate of instruments—such as the three bonds now propounded—clearly intended not to operate till after death?

The cases upon this point establish, that an instrument, whatever be its form—whether deed-poll, indenture, deed of gift, or even an indorsement upon a banker's note, may be testamentary: the form of the bonds, therefore, is no objection to their being admitted to probate. *Corp v. Corp*, and the other cases quoted in *Thorold v. Thorold*, 1 Phil. 1; *Ousley v. Carroll* (in the Prerogative Court), cited by *Lord Hardwicke* in *Ward v. Turner*, 2 Ves. 440; *Habergham v. Vincent*, 2 Ves. Jun. 205. S. C. 4 Brown, C. C. 377; *Peacock v. Monk*, 1 Ves. 127; *Tomkyns v. Ladbroke*, 2 Ves. 591; *Smith v. Ashton*, Vin. Ab. tit. Devise (A 2) 4.

The *King's Advocate* and *Phillimore*, contra.

The execution of these papers was not prevented by the "act of God:" it was postponed till the deceased's property was in a fit state for the complete arrangement which he contemplated. The only son is, in this case, a minor; and his interests are peculiarly under the protection of the Court. No decision has been, nor, we apprehend, can be, adduced where probate of two papers, each containing a final and complete disposition of personal property, was pronounced for and decreed.

If probate were to be granted of the papers propounded, the intention of the deceased would not be carried into effect: he contemplated the operation of all the unexecuted instruments together—the deed of settlement as well as the unexecuted will and bonds: (a) they, when executed, were to be substituted for his existing testamentary papers, viz. the will and codicils of 1826: these have already been acted upon; and we submit, that the probate, originally granted, should be again delivered out. The executors have no interest in the suit, but thought it their duty to apply to the Court for directions.

Lushington in reply.

Suppose the draft settlement deed were admitted to probate, there would be great doubt, whether a Court of Equity could act upon it. If, however, it be desirable to propound this deed, it may be done *apud acta*.

JUDGMENT.

SIR JOHN NICHOLL.

Upon the facts of this case there is no controversy, nor does there arise any considerable question upon the law applying to these facts. The case derives its importance only from the magnitude of the property, and from the minority of the residuary legatee: but, be its amount great, or small, the testamentary disposition must be governed by the same principles. The only question is on the validity of the unexecuted will and the unexecuted bonds.

The deceased, William Leader, described as of Putney Hill, and of Queen's Square, Westminster, died on the 13th of January 1828, leaving a widow, a son who is still a minor, and four daughters: he executed a will and two codicils in August 1826: these papers were of considerable length, distributing his large property among his family; and appointing four executors who took probate of them soon after his death. The personality, affected by the probate, is stated to be nearly 300,000*l*.

It appears that, in the autumn of 1827, the deceased wished to make

(a) The deed of settlement was before the Court, but it was not propounded: its contents and the reasons of its non-execution are noticed in the Judgment. See *infra*, pp. 106, 7.

some alteration in this will. Instructions for a new will were given; certain drafts and instruments were prepared, but the actual execution had not taken place when he died; and, as I have already said, the present question arises upon the validity of those unexecuted papers.

In order to bring that question before the Court the former probate has been called in, and these unexecuted papers have been propounded by one of the executors named in each set of instruments, and opposed by the other three executors. The suit seems to have been quite amicably conducted. The plea propounding the unexecuted papers details all the circumstances, and in proof, the answers of Mr. Langford, one of the executors, have been given, he being the confidential solicitor of the deceased employed in preparing the several instruments; and five witnesses have been examined; two of these are Mr. Langford's clerks, who supply some material facts not within Mr. Langford's own knowledge: the other three witnesses are, the medical person who attended the deceased, and two tradesmen who were called in to attest the execution; but which execution was prevented by the death of the deceased, when he was just about to execute the principal instrument—the new will.

The facts thus laid before the Court, it may be proper to state. The deceased, besides his personalty, had a valuable real estate; he was engaged in a distillery, and also in a glass manufactory. On the marriage of three of his daughters, Mrs. Crofton, Mrs. Luttrell, and Mrs. Dashwood, the deceased advanced 10,000*l.*, and, on the marriage of the other daughter, Mrs. Acland, he settled on her 20,000*l.*; 10,000*l.* in money and 10,000*l.* by bond.

On the 2d of August 1826, as I have already stated, he executed a will and two codicils; by that will, as far as it is necessary to state it, he gave to each of his married daughters, with the exception of Mrs. Acland, 10,000*l.* in addition to their settlement; and to his unmarried daughter, Ann, 20,000*l.* who was at that time about to be married to Mr. Dashwood; so that he then clearly intended, that each of his daughters should receive from him in the whole 20,000*l.* His daughter Mary (Mrs. Crofton) having been left a widow with two children, had afterwards married Captain Losack, and her additional 10,000*l.* were secured to her children by Mr. Crofton, but the deceased also gave to his granddaughter, Miss Losack, 2000*l.* The residue, real and personal, he bequeathed to his son, who then was, and still is, a minor: he appointed as executors, Mr. John Maberly, with a legacy of 1,000*l.*; Mr. Edward Temple Booth, Mr. John Masterman, and Mr. Robert Langford, each with a legacy of 500*l.*: these were the contents of the will of August 1826, so far as it is necessary to recite them.

The first codicil directed that the legacy duty should be paid out of the estate: the second, that if the son died a minor (for it was only on that contingency,) the residue, real and personal, should be divided among the daughters.

About September 1827, the deceased became unwell and grew gradually worse till his death. Mr. Langford, his solicitor and one of his executors, was at the commencement of this illness absent from London, but returned in November. The deceased, shortly afterwards, expressed to him his wish to make some alterations in his will, and in the beginning of December they read over the will together, when he gave instructions for the alterations he wished to have made, which Mr.

Langford took down in writing. Those alterations were, an annuity of 100*l.* to Miss Sandford; the omission of the conditional provision to his daughter Ann, as the marriage between her and Mr. Dashwood had taken place; the substitution of William Leader Maberly as a trustee and executor, in the place of John Maberly, his father; the omission of the legacy to the latter; the introduction of a legacy of 100*l.* to his coachman, and of one year's wages to other deserving servants; blanks were to be left for the legacies to his daughters; and the legacy to his grand-daughter, Augusta Losack, was to be 5,000*l.*

Such was the substance of the instructions given, as I understand, at the first interview; and from them, which made no very important alteration in the former will (that is, supposing the legacies to the daughters were filled up,) the draft of a new will was prepared. On the 12th of December Mr. Langford attended the deceased and read over or explained the draft to him, and was then informed by him that Mr. Atlee, his partner in the distillery, had proposed paying him 30,000*l.* for his share of the business, and that he, the deceased, had determined to invest that sum in the funds, in the names of trustees, for the benefit of three of his daughters, Mrs. Losack, Mrs. Dashwood, and Mrs. Luttrell, and their children: Mrs. Acland, as has been before remarked, had had the whole 20,000*l.* secured to her at her marriage. At this interview the deceased also told Mr. Langford, that he had it in contemplation to give bonds to the trustees of the marriage settlements of these three daughters, in order thus to secure to each of them 10,000*l.* instead of doing it by will.

At the latter end of December the deceased had a further interview with Mr. Langford, and then gave instructions for some additional small legacies; and 500*l.* a year to his wife in case she did not wish to inhabit the house at Putney; for the omission of the legacies to the three daughters, as he intended to secure them the 10,000*l.* by bond instead of by will; and for the insertion of a legacy of 5,000*l.* to his daughter, Mrs. Acland, and of 5,000*l.* to Mr. Acland—and who were to have no share in the 30,000*l.* from Atlee; of an additional 500*l.* a year for the maintenance of his son till he came of age; and if the son died before the age of twenty-one, then, instead of the residue going equally between the four daughters, he directed only 20,000*l.* to be given to Mrs. Losack and the rest among the other three. He also gave instructions for a deed of settlement of the 30,000*l.* expected to be received from Mr. Atlee; one-sixth thereof was to go to his grandchildren the Croftons, one-sixth to his grandchildren the Losacks, one-third to Mrs. Dashwood and her children, one-third to Mrs. Luttrell and her children; and, in consequence of this arrangement, the legacy of 5,000*l.* to Miss Losack was omitted. In pursuance of these further instructions drafts were prepared—of the new will without legacies to the three daughters—of the bonds securing 10,000*l.* to the trustees of each marriage settlement—and of the deed of trust for Atlee's 30,000*l.*, which latter deed was to be executed, as soon as that sum should be invested in the funds. These draft bonds, and the draft of the new will, are the papers propounded. On the 4th of January the drafts of these several instruments were carried by Langford to the deceased, were read or fully explained to him, and he approved of, or expressed his satisfaction at, them.

Here, then, were the instructions carefully decided on, after much consideration and repeated interviews, and the drafts finally approved.

The only further direction given on that day had no reference to the former part of the disposition; it was merely an authority to his executors to allow his partners, both in the distillery and in the glass manufactory, a certain time to pay in their share of the capital in these concerns.

Mr. Langford was under an engagement to go out of town on the following day, the 5th of January, and it was settled that the matters should be completed as soon as he came back, which was expected to be in a few days: but he informed the deceased that the instruments should be prepared, so that if he wished to execute them, he might send for them to his (Langford's) office. Mr. Langford, therefore, must have considered the mind of the deceased to have been finally made up. On the 5th of January the additions, respecting the time to be allowed the partners for paying off the deceased's share of the capital, were directed by Simmonds, Mr. Langford's clerk, to be inserted in the draft; and he waited on the deceased with the draft, so altered on the 7th. He found the deceased very ill, but sitting on a sofa; he informed the deceased, "That he had brought the several drafts, but would only trouble him with the alterations:" he replied, "That every thing had been arranged respecting the said will with Mr. Langford, and that he only required to have the additional clauses read to him." This was accordingly done; those clauses were finally settled; some other unimportant explanations were given, and the deceased expressed himself quite satisfied; so that here, again, was a final approbation. Simmonds then asked, "If he should get this instrument engrossed for execution?" The deceased replied, "No, nothing can be done till I see Mr. Atlee, who is to pay the 30,000*l.*; it must wait till Mr. Langford comes to town." This does not appear to have arisen in the slightest degree from any wavering of intention, but merely from a wish that the whole might be completed at once; for the deed of settlement could not be executed till the 30,000*l.* was actually invested.

It was argued, that this declaration showed that the disposition was wholly to depend on Mr. Atlee's paying this 30,000*l.* I cannot view it in that light; every thing was settled; and suppose that Atlee had changed his intention and declined to pay, it would not have affected the whole; it would be no abandonment. I cannot think that the whole matter was at all dependent upon the completion of the act by Mr. Atlee. So satisfied, however, was Simmonds of the deceased's final approbation, that perceiving the deceased was very ill, he caused all the instruments to be actually engrossed.

On the 11th of January, the deceased was alarmingly ill, but was better the next day: on Sunday the 13th, however, he was again worse, and asked his medical attendant, Fisher, "If it was the 17th?" who replied by asking, "If he had any thing to do on the 17th?" He said, "He had some papers to sign." Fisher said, "He had better not defer it:" the deceased replied, "I know what you mean:" understanding, therefore, that he was in that degree of danger, that, if it was necessary to do any act, he had better not delay it: he then immediately informed Mr. Acland that there were some papers at Langford's house which he wanted to execute; and desired they might be directly fetched. Langford had, as already pointed out, said that the papers should be ready if wanted; and though the deceased had told Simmonds that the whole business should stand over till Langford's return to town, yet, immediately on

being apprized of his danger, he sent for the papers, though he was clearly aware that the deed of settlement could not take effect. These circumstances again show final intention, and that at this time the deceased was in a perfect state of capacity. One of Mr. Langford's clerks, Stent, immediately delivered the engrossed copy of the will—but what other papers does not appear: it was carried to the deceased's house; he was informed of its arrival by Fisher; he wished to sign it; witnesses were procured; he was lifted up in bed; but, at the very moment that a pen was handed to him, he expired.

Now these circumstances, happening on the 13th, are sufficient to show adherence of intention, generally, to the arrangement he had decided upon making; but it cannot be understood that he meant to give effect to the engrossed will in exclusion of the bonds; it is quite clear that the bonds constituted a part of the arrangement which he intended should take place after his death. Fisher describes him as being in a dying state on that morning; he speaks of papers (in the plural) which he wanted to execute, not as if he wanted the will in exclusion of the bonds; no allusion was made to the omission in the will of the legacies of the 10,000*l.*, which legacies were merely omitted because he was to carry his intentions into effect in a different mode: it was as much his determination to execute the bonds as the will; the bonds were meant as a substitute for the legacies in the will.

These being the facts of the case, and the intentions of the deceased quite manifest, there seems to be no difficulty thus far as to the law.

In respect to personal property, where there is final intention proved and execution prevented by the act of God, the mere want of execution does not invalidate the instrument. The disposition intended to be made has the same legal effect, in regard to personal property, as if the instruments had been actually signed and attested. This non-execution does not in law affect the validity of these instruments as testamentary instruments applying to personal property. It is also settled law, and several cases have been decided, that if the paper contains the disposition of the property to be made after death, though it were meant to operate as a settlement, or a deed of gift, or a bond; though such paper were not intended to be a will nor other testamentary instrument, but an instrument of a different shape; yet if it cannot operate in the latter, it may nevertheless operate in the former character.

Cases of Scotch Conveyances, of Deeds of Gift, and others of a similar nature were cited in argument; and I will only mention a few in addition to them. In *Musgrave v. Down*, T. T. 1784, the assignment of a bond by endorsement,—in *Sabine v. Goate and Church*, 1782, receipts for stock and bills endorsed “for Mrs. Sabine,”—in *Drybutter v. Hodges*, E. T. 1793, a letter,—in *Marnell v. Walton*, T. T. 1796, marriage articles,—in *Maxee v. Shute*, H. T. 1799, promissory notes, and notes payable by executors to evade legacy duty,—were held to be testamentary.

These are a few out of many cases that have occurred in the Prerogative Court; and, from the Reports both at Common Law and in Equity, a variety of instances have been, and others might be, cited. (a) So that it is a settled point, that the form of a paper does not affect its title to probate, provided it is the intention of the deceased that it should

(a) See *Molineux v. Molineux*, Cro. Jac. 144.

operate after his death. Here the intention of the deceased in respect to the disposition is beyond doubt; it is clear that he meant these daughters to have the additional 10,000*l.* each; he had proposed at first to effect this in the form of legacies in his will; but afterwards thought it would answer his purpose better, to give those legacies in the form of bonds, and to omit them in the will; and these bonds therefore are to be considered as testamentary instruments, and the mere want of execution does not invalidate them; as that execution is shown to have been prevented alone by death.

The fair copy of the will and the bonds therefore taken together, though none of them are executed, contain, on the ordinary principles of the Court, the will of the deceased as to his personality. For it is clear that the execution was intended till the latest moment of his life, and that he would have executed the bonds as well as the will had he not been suddenly struck by death: nor is there any reason to suppose that he would have postponed that act till Atlee's 30,000*l.* were paid and invested in the funds.

The effect of pronouncing for probate of the unexecuted paper and the bonds may be to give a larger relative benefit to the Aclands; for the other three daughters will, under those papers as well as under the original will, each take 10,000*l.* less than the deceased finally intended: Miss Losack's legacy also may be defeated from the circuitous mode in which the deceased proposed to give effect to his intentions: the Court much regrets that circumstance, and would fain trust, that, when the minor comes of age, effect may be given to the deceased's wishes in that respect. (a) But on all the consideration that a judicial view of the subject requires, and acting on legal principles, without regarding what may be the result upon the construction of these papers, I decree probate of the fair copy of the will, (for in that way the instrument was laid before the deceased for execution), and of the bonds.

The probate which has been granted must be revoked, but the will may remain in the registry of this Court for safe custody.

(a) In the course of the argument the Court said: It was the clear intention of the deceased that his grand-daughter, Miss Losack, should have a legacy of 5000*l.*: it was taken down in writing, in the instructions given to Mr. Langford at his first interview, in December 1827, with the deceased, on the subject of his will; and it was inserted in the first draft. The revocation of the legacy was only conditional upon the execution of the deed of settlement, which was not effected.

REAY v. COWCHER.—p. 249.

The presumption is that a codicil, disposing of realty as well as personality, unattested, only signed by initials and with many interlineations, is unfinished and preparatory; and then it must be shown the deceased thought it would operate in its actual form or was prevented by a sufficient cause from finishing it.

When a paper is unfinished, the presumption of law is strong against it; especially when it is to alter an executed instrument; still more when to revoke a disposition of the bulk of the property to the deceased's own family, and transfer it to a stranger.

The *King's Advocate* and *Dodson*, for the will and codicils. [See 3 Eccl. Rep.]

Lushington and *Haggard*, contra.

JUDGMENT.

SIR JOHN NICHOLL.

This cause has been already under the consideration of the Court at a former hearing, so far as respected the validity of the will, which was opposed by the widow. A multitude of witnesses were examined; but, though much contradictory and inconsistent evidence was produced, the grounds of opposition manifestly and completely failed her; and, there being no doubt of the deceased's capacity in 1824, the will was clearly established. The wife being thereby excluded, and her interest not being affected by the codicil, the case stood over; and the Court reserved the question, arising upon the codicil, till the party interested under, and excluded by, it, intervened.

The codicil rests upon totally distinct grounds from the will. The question is, 1st. whether the instrument is finished or unfinished; and 2dly, whether, if unfinished, it is supported by circumstances sufficient to show that it contains the fixed and final intentions of the deceased, and that the finishing was prevented.

The will marks a considerable degree of resentment and want of confidence towards the son and daughter, or rather towards the daughter's husband; but still the bulk of the deceased's property (after providing for his housekeeper, and reposing trust in her, and in her sister) is to centre in his own family—in his grandchildren. Now the codicil makes a great alteration: instead of the annuities to the son and daughter, it gives the daughter and her children a house in Davies-street, and to the son and his children, another house in the same street: whether these are of equal value with the legacy does not appear; but the paper bequeaths the residue to Mrs. Reay, and authorises his executrices, (viz. herself and her sister,) if his wife, daughter, or son should institute legal proceedings, "to cut them off with a shilling." This codicil is dated on the 21st of October 1826.

Here then, between March 1824, the date of the will, and October 1826, is a complete departure from, and alteration of, the intention of the will. The son and the daughter are differently provided for, and the bulk of his property is given away from his own family—from his grandchildren; and is transferred to a stranger in blood, who lived with him in the capacity of housekeeper. To account for this great change no circumstances are adduced which rationally and naturally lead to it.

The deceased was a strange, eccentric, violent, man in temper; his quarrels with, and separation from, his wife; his alienation from his son and daughter, prove that to have been his character: but these things had occurred long before the will was made; so that these resentments account in no way for the change in the disposition of his property; and the daughter had a child, which would be an additional reason for the continuance of the bequest in their favour. So also as to his confidence in Elizabeth Reay; she had resided with him under the name of Mrs. Smith ever since 1820; and there is no evidence that her residence was otherwise than perfectly innocent, and in the character of companion and housekeeper: but there had been no change in her relation to him; no fresh quarrel with his son and daughter; they occasionally called, and were kindly received; and on the last occasion of his seeing his daughter, "he kissed and blessed her." This is proved by two of Mrs. Reay's own witnesses.

Much evidence was offered to show that the deceased was not only eccentric, and in the opinion of several insane, but that he was also much

addicted to intoxication: and Mr. Crowdy, the medical man, deposes, "That the disorder of which he died was brought on by intemperance:" and though that was not sufficient to affect the validity of a will formally drawn up, and regularly executed and attested in March 1824, yet it may be material, coupled with the change of disposition, to bear upon the inference, whether in October, 1826—within six weeks of his death—this codicil was a finished and final paper, or whether it was produced by a hasty and transient feeling, not afterwards adhered to, but abandoned.

The question then comes to this consideration, whether from the form and appearance of the paper itself, or rather of the two papers, they are to be esteemed final. There is a third paper which is not propounded; but on which an observation arises, and not an unimportant one; for, though it is a mere directory memorandum, yet the deceased's name is subscribed formally and fully: this shows his practice and habit, and affords something of an inference against the mere subscription of A, by his initials.

However, paper A, the dispositive paper, is the important instrument: it is half a sheet of gilt post letter paper: and apparently it was only half a sheet when the deceased took it up, for the writing, which covers both sides of it, begins at the gilt, and not at the torn, edge. It is not a paper therefore, on which it is likely that a methodical formal man (for so the deceased was) would begin writing an important codicil, to which he had previously made up his mind: it looks more like a hasty memorandum for further deliberation; and upon the face of it cannot be deemed a final instrument. There are various erasures and interlineations; and most important alterations, particularly in the disposition of the residue; for though, as first written, it was revocatory of the residuary clause in the will, yet this paper originally bequeathed it quite to a different person from the actual legatee, viz. to "Mr. Charles Douglas of Cambridge College:" but who he was, or why he was introduced, or why he was superseded, no account is given: and afterwards the name of Mrs. Elizabeth Reay was interlined. The paper is only subscribed with initials: is unattested: seems to have been written and subscribed *uno contextu*; and the alteration appears to have taken place subsequently; but when, is not ascertained.

The first impression therefore, was not to give the residue to Mrs. Reay: so that the origin of this codicil is not to be sought in the increase of his affection for her: and when I consider that the deceased was a man of great regularity, form, and precision; and that all the papers found in the drawer, with the paper in question, were in order, it is hardly possible to suppose, that he could have intended it as final and finished, or have proposed it to be any thing more than a mere preparatory sketch for future deliberation.

But further; his will, all written with his own hand, is signed and sealed, and was executed in the presence of three witnesses: he was aware, therefore, of the necessity of having three witnesses to a devise of real property; and part of the residue is real: if, then, he had intended this paper to operate, it is to be inferred he would have had witnesses: and it is proved by Mr. Crowdy, the surgeon, Mrs. Reay's own witness, that the deceased did intend to have the paper attested, and to do a further act in order to give it effect. The paper under these circumstances must be regarded as unfinished.

A declaration, however, is relied on: but it is quite impossible to depend on a loose declaration, deposed to at a considerable distance of time. From the experience we have in this place, we know declarations are for ever made, and for ever misunderstood, and never can operate against the conduct of the party deceased. The paper itself shows that he had a floating intention when he wrote it to do something, and that he also had the same sort of intention when he altered it: but, I have already said, it can only be considered as unfinished and preparatory; and then the question is, whether there is sufficient to establish it in that character.

When a paper is unfinished the presumption of law is strong against it; more especially, when it is to alter an executed instrument, and, *a multo fortiori*, when it is to revoke a disposition of the bulk of the property to the deceased's own family, and to transfer it to a stranger; and such would be the effect of this codicil. There is a total absence of all circumstances tending to show, either that the deceased considered this paper would operate in its present form, or that he wished to finish it, but was, by some sufficient cause, prevented. The paper is dated on the 21st of October, and the deceased died on the 1st of December, so that he lived for six weeks after he wrote it, and had abundant opportunity of completing it. True, he was confined to his bed for the last three weeks of his life, but there is no reference to this paper within the last month of his life, except a single declaration, and that, I repeat, is of no weight under the circumstances of this case.

The question then comes to the finding. The will itself was found sealed up in an envelope endorsed as the will, and placed in a tin box with other papers relating to his property. Had the codicil been also so found it might have been a very material fact, but it was found in an open drawer of a table in the room where the deceased sat, in which drawer was the memorandum to which I have adverted, and which could have been of no effect for the last three or four years of his life: this is just the situation in which the deceased might leave an unfinished, deliberative paper, to be taken out and copied whenever he should make up his mind finally to give it effect: but if he had already decided, if he meant to do nothing more, if he intended the paper to operate in this form, he would have put it away in a place of safety with his will. But, then, it is said, that paper B, a fairly written paper, was found in the same place; B, however, carries the matter no further: it is true that it is fairly written; but it ends without any stop, not even a comma, and has no date; nor does it appear when it was written, nor is there any certain *constat* to what paper it applies; there is no positive reference to A, and the direction contained in it as to the sale of the house would be unnecessary, if Mrs. Reay was already residuary legatee. The inference then is, that it is quite independent of, and has no connexion with, A, except that it was found in conjunction with it. There is, then, nothing to show that A was a finished paper; or, if unfinished, that the deceased was prevented from completing it; nor is there any circumstance to prove adherence to it, nor an intention that it should operate at the time of his death.

I, therefore, pronounce against the validity of the codicil, and direct the costs on all sides to be paid out of the estate.

ARCHES COURT OF CANTERBURY.

BEARE and BILES v. JACOB.—p. 257.

On Protest.

Though the regular appeal from a jurisdiction not peculiar but subordinate is to the Diocesan, yet, if the Judge of the subordinate and diocesan courts be the same person, the appeal may be *per saltum* to the Metropolitan: but the reason must appear by the formal instruments in the cause.

PREROGATIVE COURT OF CANTERBURY.

COLVIN v. FRASER and Others.—p. 266.

A will being executed in duplicate, one part of which was proved to have been in, and was never traced out of, the deceased's possession, and was not found at his death, the *prima facie* presumptions are; first, that the testator destroyed the part in his own possession; and second—(if the first be not repelled), that he intended thereby to revoke the duplicate not in his possession. The deceased pronounced dead intestate. The *prima facie* presumption, that the deceased revoked a will, which was in his own possession, but is either not found at all at his death, or is found cancelled; and the *prima facie* legal consequence that a duplicate, not in his possession, is revoked thereby, may be rebutted by a strong combination of circumstances leading to a moral conviction, or direct positive evidence.

In order to rebut a presumption of law, (e. g. as to the destruction of a will by a testator), declarations unsupported by circumstances strongly marking their sincerity, and confirming their probability (especially where their stringency depends on the exact words of a casual expression), cannot safely be relied on.

Declarations, coupled and consistent with conduct and acts, are of weight in proof of intention, so are those not depending on the precise words of a particular expression, but on the tenor of an extended conversation, especially if not liable to the suspicion of insincerity; still more if repeatedly made in confidential communications.

JOHN FARQUHAR, formerly of Calcutta, but late of London, the deceased in this cause, was found dead in his bed at his house in the New Road, on the morning of the 6th of July, 1826, being then seventy-six years of age; he left behind him Elizabeth Willoughby, (wife of Peter Trezevant) the daughter of a deceased brother; John Farquhar Fraser, and Dame Charlotte (wife of Sir William Templar De La Pole), children of a deceased sister; and James and George Mortimer, Charlotte (wife of William Aitken), and Mary (wife of James Lumden), children of another deceased sister; the only persons in distribution in case he had died intestate.

On the 15th of September, 1826, administration of the goods of the deceased, as dying intestate, was granted to John Farquhar Fraser. A copy of a will and codicil (executed, in duplicate or triplicate, by the deceased in India) having been received by David Colvin, the party in this cause, authenticated under Seal of the Supreme Court of Judicature at Fort William, in Bengal, a decree issued at his instance, calling upon Mr. Fraser to bring in the administration, and show cause why the

same should not be revoked, and probate of the will and codicil be granted to Mr. Colvin. (a)

The administration was accordingly brought in; and—after some pre-

(a) A comparative statement of the Will and Codicil of the 7th of March, 1814; of Paper A; and Script No. 1:—

Will and Codicil—
Dated 7th March 1814:

“I, John Farquhar, agent for the manufacture of gunpowder at Ishapore in Bengal, being about to embark for Europe, and being in sound and disposing mind, do hereby bequeath my real and personal property as follows. To my nephew John Fraser, and niece Lady Pole, each 500*l*. sterling money of Great Britain: to my friend George Wilson, at present one of my agents, 1000*l*. of the same denomination: to Sir John Royds, one of the puisne Judges in the Supreme Court of Judicature in Bengal, 500*l*. of the same denomination: to George Davidson, Esq. Mint Master of Bengal, 1000*l*. of the same denomination: to Alexander, David, and James Colvin (brothers), and Alexander Colvin, their nephew, 300*l*. each, to commence from the time of the respective arrivals of the parties in any part of Great Britain: to my old friend Dr. George French, professor, or some time since professor, of chemistry in Marischal College of Aberdeen, 300*l*. of the above denomination: to Colonel or Lieut. Colonel Calcraft 300*l*. all the above sums to be paid to the respective persons named during the natural term of their lives annually. I likewise bequeath for the purpose of promoting learning,

“such sum as may be sufficient for salaries of the following professors who are to teach during the whole of the summer, as I know from my own experience that nothing is so contrary to the acquisition of knowledge as the long vacations in the Scottish universities: viz. I bequeath for the salary of the professor of Greek 200*l*. sterling; for the salary of the professor of the second class, called the semi-class, the same sum; for that of the professors of the third and fourth classes the same sum to each: the above sums to be paid annually in lawful money of Great Britain to the new professors of all the universities or colleges of Scotland beginning with Aberdeen, next St. Andrews, next Glasgow, and lastly Edinburgh: likewise 200*l*. sterling for the salary of a professor of Mathematics, payable in the same manner, at each of the above seminaries: and my will is, that if the present professors will agree to teach during the whole year without any other vacations than those established by law, and fourteen days about Midsummer, in that case that they shall in the first instance be offered the option and receive annually the above sums during their professorships: I likewise bequeath 300*l*. annually of sterling money of Great Britain for the purpose of erecting a professorship of mathematics in the College of Old Aberdeen, unless that may have been already done: likewise 300*l*. annually for one professor of astronomy in the Marischal College of Aberdeen, and 100*l*. annually for each of two assistants: likewise the same sums for a Professor and two Assistants in the King's College, Old Aberdeen: likewise such sum as may be sufficient for the erection of two observatories of celestial bodies, and furnishing them with the necessary instruments, admitting nothing that is not absolutely necessary for the above purpose for the use of the two above mentioned professorships. Lastly I desire that [on the natural decease of the above persons, to whom annuities have been bequeathed, that the annual sums, respectively appropriated to them, shall be added to](a)

Paper A and Script
No. 1—

as far as they differ from the will and codicil of the 7th of March, 1814. The passages in Italics are the clauses which are not contained in script No. 1: in other respects, except as is hereafter noticed, and with some slight verbal variations, the three instruments coincide.

For an account of paper A, and script No. 1, see the 14th article of Mr. Colvin's allegation, *infra*, p. 117:—the 9th, 10th, 11th, and 12th articles of Mr. Fraser's allegation, p. 120;—and the 6th and 9th articles of Mr. Colvin's second allegation, p. 123.

Paper A. is also noticed in the judgment. See *infra*.

“This is the last will and testament of me John Farquhar of Gloucester Place, Portman Square, in the county of Middlesex, Esquire.

“I give devise and bequeath all my estate of what nature or kind soever not herein otherwise disposed of unto my executors hereinafter named their heirs executors and administrators for the purpose of promoting learning in manner following: viz. To apply

(a) The clause within brackets was not in paper A; nor in No. 1.

liminary steps for the purpose of citing all persons interested, and getting all testamentary papers before the Court,(a)—on the by-day after Hilary Term, 1828, an allegation, propounding the copy of the will and codicil was admitted. It, in substance, pleaded:—

1. The death of, and the persons entitled in distribution to, the deceased.

2. A detailed history of the deceased from his birth in the county of Aberdeen, to his death; his education at a parochial school, and after-

the annual surplus of my receipts, and, after providing for the other purposes [hereinbefore] expressed, shall be divided amongst the parochial schoolmasters (over all)(b) Scotland in sums of not less than 10*l.* of sterling money of Great Britain annually to each [beginning with the Schoolmasters of Aberdeenshire:] and as, in my opinion, the study of the Greek language ought to precede that of the Latin, I leave 100*l.* sterling annually to each of four teachers of Greek, provided that such a change of system be approved of by a majority of the Professors of the Universities of Scotland, and in that case, that is to be effected in preference to the provisions for parochial schoolmasters.

"Declaring this to be my last will and testament I appoint the following gentlemen to be my executors, John Bebb, George Wilson, and Dr. John Fleming in Europe, and the above-named Alexander, David, and James Colvin and Alexander Colvin the younger and John Corsar of Calcutta, Agents; and George Davidson, Esq. Mint-master of the same place. Dated in Calcutta this 7th of March 1814."

"It was signed, sealed and executed in the presence of four witnesses; and at the foot of the paper was added a codicil as follows.

"I hereby further bequeath by this codicil of the same date 1000*l.* sterling money of Great Britain to Mrs. M'Kenzie, wife of John M'Kenzie, Esq. Military Paymaster General of Bengal for the purchase of a ring. J. FARQUHAR."

And whereas I have lately agreed to sell unto David Colvin all my leasehold house in Gloucester-place, now in his occupation, for 3400*l.* but the same has not yet been conveyed to him; now I do hereby bequeath the said house unto David Colvin his executors and administrators discharged of and from the said sum of 3400*l.* And I further give and bequeath to my friend David Colvin, should he survive me, all my leasehold house in Gloucester-place, Portman-square at present in my own occupation to his executors and administrators together with all the furniture, &c. which may be contained in it at my death: and I give to each of my partners in Broad-street, London, viz. E. C. Bazett, David Colvin, W. Crawford, and J. G. Remington, the sum of *l.* in token of my regard: And my will is that in case all or any of the devises or bequests heretofore contained or any part thereof shall be void under the statutes of mortmain or otherwise howsoever, then I give and devise all my said estate unto

"And I hereby appoint my (aforesaid) partners to be executors of this my last will, and hereby revoking all former wills by me at any time made I publish and declare this as and for my last will and testament: in witness whereof I have hereunto set my hand and seal this day of November 1821."

"The usual clause of attestation was added.

(a) See Colvin v. Fraser, 3 Eng. Eccl. Rep. 48.

(b) In paper A, the words "herein-before" were "herein-after," the words "over all" were transposed; and the words, "the shires or counties of Aberdeen and Mearns in," were interlined before "Scotland;" and the words "beginning with the schoolmasters of Aberdeenshire," were struck through.

(c) In Script No. 1. here followed, "and their heirs on condition that they shall take and use the name of Farquhar."

"I give and devise all my East Mark estate in the county of Somerset unto my nephews James and George Mortimer(c) for their lives, and at their death to the eldest male heir, or in default of male issue to the eldest female heir of my said nephew George Mortimer, on condition that whoever succeeds to the possession of my said East Mark estate shall take and use the name of Farquhar. I give and bequeath to my niece Lady Pole, wife of Sir William Pole of Shute in Devonshire, the sum of *l.* and to each of her children the sum *l.* to accumulate for their benefit till they arrive at the age of 21 years respectively, and I give to my niece Mrs. , in America, the sum of *l.*

And I give and devise unto my most particular friend David Colvin of Gloucester Place aforesaid all my freehold and copyhold estates in the parish of Hanwell, Middlesex.

wards at the Marischal College at Aberdeen; and that early in life he went to India, where by close application to business and parsimonious habits, he rapidly accumulated considerable property, and at a very early period conceived an intention of leaving his property for the improvement of the system of education in Scotland, and frequently whilst in India, expressed such intention to his friends."

3. A statement respecting the deceased's relations at the time of his quitting Scotland and subsequently; and that during his residence in India he kept up no communication with them, except by directions to his agents to allow a sufficient sum annually for the maintenance and education of his nephew, Mr. Fraser, and of his sister,—then orphans; and specially directed that the former should pay particular attention to the study of Greek and mathematics.

4 and 5. The execution in *duplicate* of the will and codicil in India, when the deceased was about to return to Great Britain. (a)

6, 7, and 8. Formal articles.

9. That both copies of the will and codicil, sealed up in separate envelopes, were left in the custody of Messrs. Colvin—the deceased's agents in Calcutta; that he arrived in England at the end of 1814;—in 1816, became partner of a house of agency in Broad Street, under the firm of Bazett, Farquhar, Crawford and Co.; that his property at the time of his death was nearly of the same value as at the date of his will; that he desired one part of the will to be transmitted from India; and that in 1816, a sealed packet endorsed "the will of John Farquhar, Esq." arrived in England, and was delivered by David Colvin into the deceased's possession: that he frequently conversed upon the system of education in Scotland, and the improvement thereof; and whilst in Scotland, in 1816, made various inquiries at Aberdeen and elsewhere upon the subject.

10. That on his arrival from India, he was disappointed at Mr. Fraser's progress in mathematics: in 1817, wholly discontinued the allowance to him, frequently expressed dissatisfaction at his conduct, and declared he should inherit no part of his property.

11. Great intimacy with David Colvin; declarations to him and to others of his friends, that he, the deceased, had left his property for the improvement of education in Scotland, and that Colvin was one of his executors.

12. That the deceased, being about to proceed to Paris in October 1821, brought with him to Mr. Colvin's house (the carriage which was to convey him to Dover being at the door) the packet (pleaded in the ninth article) which was now open; that he took from it a paper which he described as his will; and, on a separate sheet of small foolscap paper, hastily wrote and executed a codicil, thereby devising the East Mark estate (which he had lately purchased) to his nephews, James and George Mortimer, on condition of their taking the name of Farquhar;—a leasehold house and small estate to David Colvin;—and appointing, with 100*l.* legacy, his partners in the house of agency executors: that the will and said codicil with the original envelope were left in the hands of David Colvin, who deposited them in the deceased's iron chest in Broad Street.

(a) The due execution of this will and codicil, but in *triplicate*, was admitted by the next of kin.

13. The purchase in 1822 of the Fonthill estate; inquiries respecting the effect of the statutes of mortmain, and declarations of his want of affection for his heir at law, saying, his heir at law was a vagabond in the back settlements of America."

14. That Mr. Colvin, apprehensive that the said codicil might be invalid, on consultation with his partners and with the deceased's solicitor, sent to the deceased at Paris a sketch will, No. 1. and also a draft will, paper A.; that the deceased, on reading it, declared "it would be of no use to make such a will, as he had two already of the same effect, and that one was in his own possession,—the other in India."

15. That in 1822, on his return from France, the deceased took his will and codicils to his own residence; that in the spring of 1822 or 1823, he destroyed the codicil in Broad Street, in a fit of anger with Mr. Colvin, but afterwards expressed his regret and was reconciled.

16. Pleaded the execution of a codicil on the 17th of July, 1828, and that it was deposited with a solicitor: (a) it also pleaded declarations to Harry Phillips and others, "that in consequence of the statutes of mortmain, he (the deceased) intended to sell the Fonthill estate, of which no conveyance had been made to him,—alleging as a reason, that conveyances might at once be made to the next purchaser, and that he should thereby save the stamp and duty;" and that he had, previously to his death, sold or agreed for the sale of the greater part of the said estate.

17. That in the early part of 1822, the before mentioned iron chest, and also a certain cabinet, were sent to the deceased's residence in the New Road: it further pleaded declarations, from the beginning of 1822 to his death, "that he had a will or two wills which he made in India, that one remained in India and the other in his own possession, that he kept the latter in the cabinet, and that David Colvin and Dr. Fleming were two of the executors."

18. A declaration in February 1823, to his solicitor, Mr. Drake,—on his suggesting that he should make a new will—"I have a will by me; it is in that cabinet, and David Colvin and Dr. Fleming are two of the executors."

19. Declarations to Mr. Hume in January 1825, "that he (the deceased) had a will in the said cabinet;" and also declarations of the contents of such will;—which were to the same effect as the bequests in the will propounded.

20. A further declaration to Mr. Hume, "that he could not take more than four shares in the London University, because it might interfere with his intentions in respect to the college at Aberdeen, and to education in Scotland in general."

21 and 22. Further declarations on the 29th of June 1826, to George Harry Phillips, "that he [the deceased] had two wills (which he had made in India) one part thereof in his own possession, and one in India;" and on the 4th of July 1826, to Harry Phillips, "that he had already two wills;" that on Harry Phillips stating, "unless he, the deceased, made a codicil to such will in the presence of three witnesses it would only convey personal property; the deceased replied, 'he would sell all that remained of the Fonthill property:' and that, on leaving Phillips,

(a) This codicil was brought into the registry by the solicitor, and was propounded on behalf of Mr. Colvin; it is noticed in the judgment.

he appointed to return the following day, but did not keep such appointment."

23. Frequent declarations during the latter part of his life, that Mr. Fraser should never have sixpence from him; that the Mortimers had received too much from him already, and should have no more; (this more especially to Harry Phillips, on the 4th of July, 1826,) and that none of his relations should be benefitted by his property at his death: that on Mr. and Mrs. Lumsden going to Fonthill in 1822, he expressed displeasure at their coming, and said "she was no relation of his;" and would not permit them to dine at his table.

24. That for several years before his death the deceased was in an enfeebled state of health, and that during the last few years of his life, and particularly the last twelvemonth, he was in the habit of leaving his papers lying about his room, and on going out he usually left his cabinet and other places unlocked, or locked, leaving the keys about; that he occasionally locked his room door, but frequently left in the key, and that after his death several of his papers of importance and an envelope endorsed "Will of John Farquhar, Esq.," or to that effect were found in the said cabinet, and that such envelope was taken possession of by Mr. Fraser.

25. That Mr. and Mrs. George Mortimer, about two years before the deceased's death, prevailed on him by false pretences, to allow them to reside in his house in the New Road, during his absence, and were from such time to the deceased's death in the habit of residing in it for a considerable time together; and that the deceased expressed great dislike of Mrs. Mortimer: that while there, they were frequently, and for a considerable time together in his room, where the said cabinet and iron chest were; and had free access to his papers.

26. That it being understood Mr. Colvin was one of the deceased's executors, he attended with Mr. Drake and Mr. Fraser, at his house in the New Road, for the purpose of searching for his will; that they searched for the same with two of the deceased's servants; Mr. and Mrs. Mortimer having refused or declined to attend: that one part of the will and codicil, received by the deceased from India, was not cancelled or destroyed by him, nor by his directions, but was destroyed without his knowledge, privity, or consent.

27. That soon after his death disputes arose between Mr. Fraser and Mr. George Mortimer as to the grant of administration: that Fraser having obtained the same to be granted to him, alone, George Mortimer and his wife expressed great dissatisfaction thereat; and in a few days afterwards, Sarah Hurst, widow, being at his house in Gloucester Place, Mrs. Mortimer, his wife, expressed herself to Sarah Hurst (with whom she was intimately acquainted) in terms of anger and resentment at Mr. Fraser's conduct, and said "John Fraser is under great obligations to me; for if it had not been for me he would have had nothing; for I destroyed the will;" or to that effect; and repeated the same expression, thereby meaning that she had destroyed the duplicate of the will of the deceased, which he had in his own possession. (a)

(a) In the course of reading the evidence, the counsel for the next of kin took an objection to the deposition on this article, on the ground that the declaration of the wife could not be evidence against the husband. 1 Phillips, p. 76. 7th edition. 2 Starkie on Evidence, pp. 45. 707; nor against the other parties, on the ordinary principle that

On the first session of Trinity Term an allegation, with forty-five exhibits, was admitted on the part of the next of kin: it pleaded—

1 and 2. The deceased's real estate as worth 60,000*l.*; other freehold estates—for the sale of which he had contracted, 170,000*l.*: other personal property, 310,000*l.*: and certain slight inaccuracies in the history of the deceased, and of his family as pleaded by the executor.

3. That the instruments propounded were duplicates of a will and codicil brought by the deceased to this country, or shortly afterwards transmitted to him from Calcutta, and subsequently cancelled and destroyed by him. That the said duplicates remained in India, in the custody of Colvin & Co. of Calcutta till after the deceased's death. That the deceased, when he left Calcutta, never intended to, and never did, return to India.

4. That in September, 1816, shortly before his visit to Scotland, the deceased deposited in the hands of Messrs. Whitbread of London, Brewers, (in which firm the deceased was a partner,) certain papers, among others, a paper sealed up in an envelope, which he declared to Mr. Bland, one of the partners, was his will; that the said paper was a will of the deceased, and remained there three months, and till after his return from Scotland, when it was returned to, and subsequently cancelled and destroyed by, him.

5. That Mr. Colvin, by the deceased's desire, about the latter end of 1821, wrote to Mr. Drake, solicitor to the deceased and to the house of agency, for instructions for making his will; that Mr. Drake wrote a full letter of instructions, which was delivered to the deceased, and found among his papers at his death; and that, from and after the receipt of such letter, the deceased well knew the effect of the statutes of mortmain.

6. Exhibited Mr. Drake's letter.

nothing except what was given under the sanction of an oath, was evidence against third persons.

On the other side it was argued, that on the principle of the case of *Carey v. Adkins*, 4 Campb. 92, the evidence was admissible against the husband; and being evidence against him it was evidence against all the parties in the same interest, as the answers of one executor may be read against the other;* and further, that the parties, having neglected to object to the admissibility of the allegation, pleading the declaration, were now barred from objecting to the depositions taken on that plea.

In reply;—that if these declarations were not legal evidence, it was never too late to object; as, in Chancery, the evidence of an interested witness is struck out whenever such interest is discovered; and further, that even if the objection were not raised by the party, the Court was bound to see that the cause was decided upon legal evidence: so, at Nisi Prius, the Judge, as soon as he discovers that the evidence is not strictly legal, always stops it and tells the Jury not to give it any consideration. In *Carey v. Adkins* the wife was acting as the agent of the husband, and then her declaration stood upon the same ground as that of any other agent. 1 Phillpotts on Evidence, p. 85. 2 Starkie on Evidence, 46. 707. It seemed to be admitted that these declarations were not *per se* evidence against third persons; but it was contended, that if evidence against one party it was evidence against all. But it is unnecessary now to argue this last point, which involved a question in these Courts deserving the nicest consideration; they would, however, merely say that, in Lord Trimlestown's case, Lords Eldon and Redesdale held the contrary doctrine.†

Per Curiam.

Without expressing any opinion as to the ultimate admissibility of this part of the deposition, it may be argued upon *de bene esse*.

* See *MacLae and Ewing v. Ewing and others*, 3 Eng. Eccl. Rep. 137.

† 1 Bligh, 452, (New Series).

7. That about the latter end of 1821, the deceased sent to George Mortimer to meet him at the house of David Colvin in Gloucester Place, "and, that the deceased then and there in the presence of George Mortimer and David Colvin produced a will or testamentary paper, and proceeded to cancel and erase by striking out with a pen many material parts thereof, and to make many material alterations in the disposition and bequests contained in the said will or testamentary paper, and did then and there also erase or strike out with a pen the attestation clause and the names of the subscribed witnesses, and did afterwards restore some of the bequests and dispositions so altered."

8. That the codicil, (pleaded in the twelfth article of Mr. Colvin's allegation) was on the same occasion written on the back of the will, that it revoked all former wills, and declared the will, as altered, together with the codicil, to be his last will and testament; and that the codicil was attested by two servants, and deposited in Mr. Colvin's hands.

9. That paper No. 1, in Mr. Colvin's hand-writing, then in the registry, was an exact transcript of the altered will and codicil, save a certain clause as to the statutes of mortmain.

10. That from No. 1, Mr. Colvin drew up paper A. with certain (specified) alterations. (a)

11. The handwriting of No. 1. and A.

12. That Mr. Colvin intending that the deceased should supply the blanks and execute paper A., transmitted the same to the deceased at Paris, in an envelope, consisting of half a sheet of foolscap paper of English manufacture, endorsed in the handwriting of Mr. Colvin, "Copy of the will of John Farquhar, Esq. and codicil thereto:" that on the receipt of such paper, the deceased expressed himself angry at the conduct of Mr. Colvin in sending it to him; and that he never executed the same, nor any copy thereof: that, on the return of the deceased to England, he cancelled and destroyed the will and codicil, so executed before he went to Paris, by tearing it in the presence of Mr. Colvin; but kept paper A. and its envelope in his possession; and afterwards placed them in a cabinet which stood opposite to the fire-place in his sitting room in his house in the New Road, "where the same remained until the said paper writing was without the knowledge of the deceased abstracted from the said envelope by some person and at some time unknown to Mr. Fraser, but that the envelope was left in the cabinet folded up."

13 and 14. That the deceased purchased Fonthill Abbey on speculation, and not as a permanent investment; and that his resolution of selling the same was not formed in consequence of the operation of the statutes of mortmain; and that, subsequent to Mr. Drake's letter, he purchased other landed property, and advanced money on mortgages, and was, at his death, in possession of landed property, worth 60,000*l.*, and of leasehold estates; that he had not foreclosed any of the mortgages; but in September 1824, voluntarily offered to permit 100,000*l.* to remain on mortgage; and in October 1824, lent a sum of 20,000*l.* upon mortgage.

15. Exhibited, in supply of proof, two letters to his banker.

16. That after his return from India, he conceived a great affection for several of his nephews and nieces, particularly for George and James Mortimer, and Lady De La Pole; that in 1814, he resided for a year

with Sir William De La Pole; and, to the time of his death, was on the most friendly terms, and corresponded with them; and that from 1822 to his death, Mr. and Mrs. George Mortimer almost constantly resided with him in the greatest harmony.

17. Exhibited a letter from the deceased to Sir William De La Pole.

18. That after 1820, the deceased frequently advanced to George Mortimer sums of money; and previous to his going to Paris in 1821, gave an order upon his bankers, "to advance him such sums of money as they might think prudent, subject to the opinion of Mr. Colvin."

19. Exhibited the order.

20. That in 1824, the deceased executed a memorandum of agreement to convey to George Mortimer certain lands, not to exceed fifty acres—part of the estate of Fonthill—for the erection and convenient enjoyment of a woollen manufactory.

21. Exhibited the memorandum.

22 and 23. Pleaded and exhibited an order in writing on his bankers to honour George Mortimer's checks, which order was in force at the deceased's death.

24. That the deceased gave his bankers directions to honour George Mortimer's checks to the amount of 20,000*l.*, who, at sundry times, drew to the amount of 10,000*l.* That the deceased declared, that such was the case, and expressed his approbation of George Mortimer's behaviour in these matters, and of his assiduity in business.

25 and 26. That, from 1818 to his death, the deceased treated George Mortimer with great affection, kindness and confidence, and also had a great esteem and regard for Mrs. George Mortimer; and exhibited, as proof thereof, twelve letters from the deceased.

27 and 28. Pleaded that David Colvin well knew of the deceased's regard and confidence in George Mortimer; and exhibited, in proof, two letters from David Colvin to George Mortimer, dated in November 1821, and November 1824.

29. That the deceased's permission to Mr. and Mrs. George Mortimer to reside in his house in the New Road, was applied for under the advice of Mr. Colvin, and readily granted by the deceased.

30. Exhibited the letter of permission from the deceased.

31. That in 1825, the deceased also authorized James Mortimer to draw upon his bankers for money; and advanced to him from time to time 1300*l.*

32. Exhibited the letter to, and order on, the bankers.

33. That though for a considerable period he was greatly offended at Mr. Fraser, on a groundless report, he was afterwards reconciled to him, and from and after the summer of 1822, was on friendly terms, and received him at his house with hospitality; and on the day before his death Mr. Fraser passed upwards of two hours with the deceased at his house in the New Road.

34, 35, 36, 37. Pleaded written and verbal declarations, from 1821 to 1825,—to show that the deceased had destroyed the will, and intended to die intestate; others,—that he had executed a will of a different tenor from that propounded; and exhibited a letter from the deceased to Mr. Alderman Wood in 1825.

38 and 39. Declarations of David Colvin (before and since the deceased's death,) to his belief, "that the deceased had no will; and that it was impossible to get him to make one."

40. That the deceased was not careless about his papers of importance, or his depositories, and that he always carried about his person two keys which opened boxes—one containing articles of value—the other, the keys of all his depositories, and that on his death, the said two keys were found by Mr. Colvin under his pillow, tied up in his handkerchief, as was his constant custom.

41. That Mr. and Mrs. George Mortimer did not refuse to attend the search; but, being at Fonthill at the time of the deceased's death, they were unable, though they proceeded with all dispatch, to reach London before the search on the morning of the 7th of July.

42, 43, and 44. That the search was principally conducted by Mr. Colvin, and no papers of moment found in the cabinet, except two bonds of Mr. Colvin to the deceased, and an envelope (as described in the twelfth article,) with this endorsement "Copy of the will of John Farquhar, Esq. and codicil thereto:" and not "Will of John Farquhar, Esq." and that, after administration had passed, this envelope was destroyed by Mr. Fraser in the presence of a witness who had particularly noticed and could describe the same; and that Mr. Colvin admitted at the search, that it was the envelope of paper A, and that the endorsement was in his handwriting: and further—that the deceased himself, after his return from Paris, had destroyed the altered will and codicil.

45 and 46. Denied that there had been any dispute about the administration between Mr. Fraser and George Mortimer;—explained the circumstances under which it had been taken out, and exhibited in supply of proof, four original affidavits of Mr. Fraser and Messrs. Mortimer.

47, 48 and 49. That since the death of Mr. Farquhar, the firm in Broad Street, of which David Colvin was a partner, had paid over to Mr. Fraser, as administrator, 15,000*l.* in part payment of a sum due to the deceased as his share of the partnership;—and then entered into a further statement of account, and a communication relative thereto, and exhibited, in supply of proof, certain accounts, vouchers, and bonds.

50. That, (in contradiction to the 15th, 17th, and 18th articles of Mr. Colvin's plea,) the deceased did not reside in the New Road till the summer or autumn of 1823.

51. That for many years previous to his death he had no property in India or elsewhere out of Great Britain, and that four persons—respectively executors or legatees in the will propounded—were dead.

52 and 53. That for some time previous to his death he had lost all confidence in the Messrs. Phillips:—and exhibited a deed executed by the deceased, revoking all revokable instruments made by him in their favour.

On the by-day after Trinity Term an allegation, with eighty-two exhibits annexed, was admitted on behalf of Mr. Colvin.

1. Pleaded, that the deceased, while in India, corresponded with George Wilson (an executor in the will propounded,) and therein set forth the manner in which he intended to dispose of his property at his death, and that he was willing to assist his relations during his life, but that they should not inherit his property." That after his return to this country, he continued to correspond with Mr. Wilson till the death of the latter in 1816; and in one of those letters, referring to the statutes of mortmain, he inquired, "whether he could leave to a permanent body a specific sum to be realized by the sale of land; and that if he could not,

he must give up a purchase which he then contemplated;" and he also inquired, "whether the law of Scotland was the same in that respect as the law of England." That in another letter, he expressed his regard for, and obligation to, Mr. Colvin.

2. Exhibited five letters.

3. That in the latter end of 1816, on Mr. Colvin's endeavouring by letter to reconcile the deceased to Mr. Fraser, the deceased wrote two letters to Mr. Colvin, "expressing great anger at the conduct of Mr. Fraser towards him, and that he was resolved he never should be his heir;" and about the same time wrote to Mr. Fraser to the same effect.

4. Exhibited the letters.

5. Declarations of the deceased that he would make a codicil to his will, and appoint his partners in Broad Street executors;—that, the day before his departure for Paris, and the execution of the codicil of October 1821 at Mr. Colvin's house, he called on Mr. Drake to give him instructions for a codicil, but did not see him: that the only obliterations which he made in the will, on the following day at Colvin's house, were, striking out the annuities to Mr. Fraser, (at whose conduct he expressed great dissatisfaction) and to Lady De La Pole: that at the same time he wrote the order on his bankers, exhibited in Mr. Fraser's 19th article.

6. That Mr. Colvin consulted with Mr. Drake on the validity of the said codicil, and on the effect of the statutes of mortmain upon the bequests in his will: that the letter annexed to Mr. Fraser's allegation was Mr. Drake's answer, whereupon Mr. Colvin prepared a sketch No. 1. and paper A., and therein added "the form of a bequest to himself of the deceased's house in Gloucester-place, which the deceased had frequently declared his intention to bequeath to Colvin: that the annuities to Fraser and Lady De La Pole having been struck out by the deceased, and some other annuitants in the will dead, and the deceased having by his codicil changed his executors, he (Colvin) left the annuities open for the deceased to insert as he might think fit. That No. 1 was not an exact transcript of the will with the exceptions mentioned in Fraser's 9th article."

7. That paper A. was not enclosed in an envelope indorsed "Copy of a will of John Farquhar, Esq. and codicil thereto;" but was sent in the same cover with Mr. Drake's letter.

8. Pleaded the deceased's regard for, and confidence in, Mr. Colvin; and exhibited fourteen letters written by the deceased while at Paris and at Fonthill; and, in one, he expressed an intention "of purchasing lands in France, and that he should thereby avoid the abominable mortmain."

9. That during a journey to Fonthill a servant boy received from the deceased and gave to De La Hante—(a witness with whom the deceased became acquainted at Paris) some provisions wrapt up in a piece of waste paper, and that De La Hante observed, that the same contained the draft or form of a will of the deceased's; and which was the draft of a will (Paper A.) transmitted to the deceased at Paris. That De La Hante indorsed the following words now appearing thereon. "Given to me by John, Mr. Farquhar's servant, in bringing me a bit of bread on the 12th of July 1823 at Winterslow-Hut Public House, Salisbury," but that he did not inform the deceased of the same being in his possession. It then pleaded the delivery of this paper by De La Hante to Phillips in whose possession it remained, and that it was never, after the 12th of July 1823, in the deceased's power.

10. That paper of English manufacture is always used in India; and that the propounded will and codicil, and also the duplicates, envelopes, official copies, and several of the exhibits, sent from India, were on English paper.

11 and 12. Referred to arrangements respecting the partnership in Broad Street, to a loan from the deceased to Mr. Colvin, and to the payment of 15,000*l.* to the administrator; and pleaded, "that on the 7th of May 1827, Mr. Colvin first received intelligence of the existence of the will in India, which he immediately communicated to Mr. Fraser, and on the 25th, on the receipt of further intelligence, retained counsel."

13. Referred to a correspondence, commencing in the middle of August 1827, between Mr. Fraser and the house of agency relative to the accounts, and to this will: and alleged, that on the 17th of September 1827, Mr. Colvin received the official copy of the will and codicil and other papers, together with a letter from Calcutta, dated March 1827; and that soon afterwards a copy of the said will and codicil and other papers was delivered to Mr. Fraser, who, in a letter of 16th October 1827, acknowledged the receipt of the same.

14. Exhibited the correspondence and letters.

Two additional articles recited the fifty-first article of Fraser's allegation, and pleaded that the deceased had a ship engaged in trade with India from 1819 till 1826.

The *King's Advocate* and *Dodson*, for Mr. David Colvin, the executor. (a)

The question is, whether the paper propounded is Mr. Farquhar's last will. It is in a perfect and entire form, and duly executed, so that—laying out of consideration, for the present, any question as to its being a duplicate—if it had been in the possession of the executors at his death it would have been entitled to probate in common form: for the *prima facie* presumption being in favour of such a paper, the next of kin must show a revocation, express or implied.

The case on the other side rests on this proposition, that the non-appearance of the copy in the deceased's possession destroys the duplicate: this proposition is founded on three presumptions; 1. that the part once in his own possession, but not forthcoming, is destroyed; 2. that the destruction was the act of the testator himself; 3. that such destruction is the revocation of the other part in India. Here is no proof, except from declarations, of any destruction; still less by the deceased: nor is there any evidence of his intention to revoke.

We do not deny that if a cancelled or mutilated will is found among a deceased's papers, the presumption is that such cancellation or mutilation was the deceased's own act; *there* is a foundation for the presumption—the paper in a cancelled state: but, where a will is merely not forthcoming, it may have been abstracted unknown to the testator (though the Court would not easily presume fraud); it may be still in existence—though mislaid; or it may have been inadvertently destroyed by the deceased, or by some other person. The question then is, whether this instrument was purposely destroyed by the deceased; the onus is on the next of kin: and, should this matter rest only *in dubio*, the Court would not pronounce for an intestacy with a perfect paper before

(a) The report of the arguments has been confined as much as possible to the questions of law.

it; more especially looking to the history of this case, from which it is extremely improbable that the deceased would purposely have destroyed a paper which embodied his well known intentions for many years, before and after 1814; and from which there is not only no sufficient evidence of departure, but to which there is proof of adherence within two days of his death.

We do not admit the position, that the non-appearance of one part of a will in the testator's possession in England is a presumptive revocation of the other part in India. The ordinary presumptions that arise from a manifest cancellation of a paper by the deceased, do not apply. A duplicate of equal date, being for the very purpose of guarding against accident, is an additional proof of the testator's full intention and anxiety to give effect to the disposition: and thus materially differs from an executed draft; for the latter being superseded by the execution of the will, may be said to be utterly extinguished, and would not easily revive by the non-appearance of the will. But even if a draft could be shown to correspond in all its material features with the will, and there was no proof of a destruction of the latter, *animo revocandi*, by the deceased, nor of any change of intention; still more, if the draft remained in his care and possession, it might, perhaps, under strong circumstances, be pronounced for.

Per Curiam.

The draft would not, in any such case, be valid as a draft; it would only be evidence of the contents of a valid will.

Argument Resumed.

It appears in this case that the duplicate in the testator's possession had been much altered. What then would be the inference if the testator had destroyed the paper so altered?—that he reverted to the will in its original state, and intended the duplicate in India to operate. The Court said in *Kirkcudbright v. Kirkcudbright*:(a) “If a latter will contains a disposition quite of a different character, the law may presume such a complete departure from the former intention, that a mere cancellation of the latter instrument may not lead to a revival of the former; but intestacy may be inferred. If, however, the two wills are of the same character, with a mere trifling alteration, it may be presumed (because it is the rational probability) that, when the testator destroyed the latter, he departed from the alteration and reverted to the former disposition remaining uncanceled.”

Addams, for the Parochial Schoolmasters of Scotland.(b)

The will executed in 1814 was adhered to till 1821. The question, as may be deduced from the observations of the Court in *Davis v. Davis*,(c) is, whether the evidence in this case leads to a “moral conviction.”

(a) Vol. I. p. 327. [3 Eng. Eccl. Rep. 141.]

(b) The Court, before the commencement of Dr. Addams' argument, stated, that it did not mean to recognize the principle that, when an executor—the appointee of the testator—was before the Court propounding a paper, all persons benefited by that paper had a right to be heard by their counsel without showing some good and sufficient cause; e. g. suspicion of collusion; want of information; or some other reason which would render the executor less capable than the intervener of conducting the suit. But, in this instance, the Court said, it was perfectly ready to hear the counsel for the intervener, but with a reservation of all questions as to his right; and on an understanding that this permission was not to be drawn into a precedent.—See, upon the right of intervention, *Wood v. Medley*, Vol. I. 645. [3 Eng. Eccl. Rep. 275.]

(c) 2 Add. 226. [2 Eng. Eccl. Rep. 277.]

tion" that the deceased did not himself destroy the duplicate. Here the presumptive proofs are irresistible, that the deceased adhered to the will in preference to an intestacy. The case set up by the executors is, that he did not destroy the copy in his possession, or that if he did, it was not done *animo revocandi*. The positions to establish this case, are, 1. An early and fixed intention in the testator thus to dispose. 2. The execution of a will in duplicate, which is not denied. 3. That there was nothing substantial to induce an alteration. 4. Recognitions of his will to the latest period of his life. 5. That, latterly, the deceased was careless of his papers, and surrounded by persons who had a great interest in their destruction.

The allegation of the executor being generally proved, is the case changed by the evidence on the plea of the next of kin? They set up, 1. That the deceased probably would destroy his will. 2. That he did destroy it. 3. That he recognized its destruction. But there is no proof that he did himself destroy it as laid in the 12th article of their allegation: and if they fail in this principal point, they cannot fall back on a subsidiary part of their case, viz.—the high probability that the testator would destroy his will; nor upon declarations, that he had destroyed it. If, however, they could fall back upon this secondary case, it must be established by most unquestionable evidence; and of this there is a total want.

I have hitherto considered this will as if a single copy: I will now consider it as a duplicate. I admit the presumption that the destruction of one part is the revocation of the other part. Sir Edward Seymour's case, and *Mason v. Limbery*, Comyns' Rep. 451. S. C. Viner's Abridgment, tit. Devise (R. 2), pl. 17. But in those cases there was direct proof of the destruction of the instrument *animo revocandi*. I contend, that when a duplicate is in existence, cancellation or destruction must be proved of the other part; it is not sufficient to show mere absence or non-appearance as in this case: for a legal presumption cannot be grafted upon a legal presumption. *Mason v. Limbery* shows, from the concluding observations upon that case, as reported in Viner, the anxiety of the law to give effect to a duplicate.

Phillimore and *Lushington* for the next of kin.

We admit that this, being a regularly executed will, is, independent of all extraneous circumstances, *prima facie*, entitled to probate unless revoked: there are, however, three admitted facts. 1. That the paper propounded is a duplicate, and was left in India. 2. That the counterpart was in the custody of the testator. 3. That on his death that counterpart was not forthcoming, but what became of it there is no direct evidence. Two presumptions arise. 1. That where a will is left in a testator's possession, its non-appearance is *prima facie* proof of a destruction by him *animo revocandi*. *Loxley v. Jackson*, 3 Phill. 128. [1 Eng. Eccl. Rep. 375;] *Wilson v. Wilson*, 3 Phill. 552, 3. [1 Eng. Eccl. Rep. 467;] *Davis v. Davis*, 2 Add. 226. [2 Eng. Eccl. Rep. 277.] Here it must be presumed that the deceased destroyed the counterpart himself, because he had the power over it; next, because no one else is proved to have had access, and lastly, because he alone could innocently destroy it on purpose.

2. If the testator destroyed the counterpart *animo revocandi*, it is not disputed that it was a *prima facie* revocation of the other part—not within his own reach. *Rickards v. Mumford*, 2 Phill. 23. [1 Eng. Eccl. Rep. 170.] Sir Edward Seymour's case, and *Mason v. Limbery*;

where it is observed, in the report in Comyns—"That it was agreed if A. had been completely cancelled, the duplicate would have been thereby also cancelled," Comyns' Rep. 453. And still further—that it is a revocation of a counterpart in the deceased's possession. *Pemberton v. Pemberton*, 13 Ves. 290. It is said, however, that one presumption cannot be founded on another. But we deny this: Pothier remarks, "the presumptions of most frequent occurrence are those in which, from certain established facts, an inference is deduced that may or may not be true; but the truth of which being much more conformable to probability than its falsehood, is regarded as sufficiently proved until the contrary is shown. To induce this presumption, the facts from which it is deduced should be either directly established, or themselves deduced from other facts upon the same principle of inference, so that the ultimate presumption may be connected, either mediately or immediately, with facts established by proof." Pothier on Obligations, p. 332. Evans' edition.

If then the previous presumption of revocation by the deceased himself arises, the other—of the revocation of the part not in his own possession—necessarily follows, though it may be a presumption of a lower degree, than when founded on a fact established by positive proof. The onus of rebutting these presumptions lies on the executor; but the evidence does not rebut them, either by showing, 1. Spoliation. 2. Loss or destruction by accident. 2. The existence of the paper at present. All these are possible, but contrary to probability; and the first has against it the additional presumption arising in favour of innocence.

It is admitted there is no direct affirmative evidence to establish any of these; and the case rests upon a mere inference, that it was not probable the deceased would destroy the paper. It may be much doubted whether the general presumption of law can be rebutted in this way: there must be facts "producing a moral conviction." *Davis v. Davis*: but here are no such facts. The whole of the evidence here, except one declaration, would equally justify the Court in pronouncing for a draft as for the counterpart in India. On the principle contended for by the other side, whenever a will is not forthcoming, the Court upon mere loose evidence of the improbability of the destruction by the deceased, might be called upon to pronounce for a draft.

The question is not between a will and an intestacy, but the will of 1814 and any other disposition of his property that Mr. Farquhar might choose to make. He might neither like his existing will nor an intestacy; he might have meditated something different from both, or not have made up his mind to any specific disposition. To pronounce for this duplicate it must be shown that the deceased believed it to be an existing, operative will: and it must be remembered that this was a will made on the eve of his departure from India, which fixes upon it a more transient character, particularly after an absence from his relations of more than forty years.

The effect of altering the will, and executing the codicil of October 1821, was a republication of the will, as altered in such very material points, but it was a revocation of the will, as it originally stood, and of the duplicate: the duplicate therefore from that time was altogether extinct unless subsequently revived by circumstances: *Wilson v. Wilson*: and of such circumstances there is an entire absence. The case of *Kirkcudbright v. Kirkcudbright* is to the same effect, though cited to

show that the part in India would revive. The subsequent destruction of the codicil, if on a separate paper, would leave the part of the will of 1814 in the deceased's possession in its altered state a valid and subsisting will; but would not revive the duplicate.

The *King's Advocate* and *Dodson* in reply.

The question is what is the law applicable to the facts; the case is *sui generis*: all the cases cited were attended with circumstances leading to a direct presumption of destruction by the testator. The early history shows that the will of 1814 was not a hasty but a mature intention, originating in 1790, consummated in 1814, adhered to till 1821, and for a departure from which there are no probable grounds.

Addams, in reply.

The main fact set up by the next of kin, viz. the cancellation of the will at a certain time and place having totally failed, their whole reliance is on a subordinate case, which equally fails them. As to the law; it is said, the codicil was a republication of the will as altered, and a revocation of the will in its original state; if so, there were then two wills—that of 1814—and the republished will. Unless therefore the Court can presume a total oblivion of the will of 1814, there is an end of the question: for a later will, which is not forthcoming, will not operate as a revocation of an earlier will. *Goodright v. Harwood*, 2 Black. Rep. 937. S. C. 3 Wils. 497.

Rickards v. Mumford is also in favour of my position; that where a will is executed in duplicate, and the part in the deceased's own possession cannot be found, the duplicate is not revoked by such absence solely. The doctrine of the civil law is, that where the duplicate is found cancelled, it must be shown that it was done by the deceased *animo cancellandi*, and that he intended to die intestate. Dig. 28. 4. 4. So *Swinburne*, vol. iii. p. 7. s. 16. So *Seymour's case*. The *onus probandi*, that the will was cancelled *animo revocandi*, is on the next of kin, and nothing short of establishing that will suffice.

It has been uniformly held that, in this sort of case, fraud may be presumed. *Swinburne*, vol. iii. p. 7. s. 16. If it could not, the plea should have been opposed.

JUDGMENT.

Sir JOHN NICHOLL.

The amount of property depending in this cause is of a magnitude so great as to impose a painful responsibility on the individual whose duty it now becomes to pronounce the decision of the Court. The bulk of the evidence introduced into the case, not very disproportionate to the amount of the property, increases at least the labour and attention necessary to the due consideration of its just result: but were it a case in those respects under ordinary circumstances, the points to be decided would not in my judgment be attended with any very considerable difficulty; for after maturely examining the proofs, and weighing the arguments which have been so very ably pressed on this most important case, I should, but for the special circumstances already adverted to, feel little hesitation respecting the judgment which ought to be given.

It will be convenient, first, to state the leading facts, so far as they admit of little controversy, or are established by clear evidence: Secondly, to advert to those legal principles applicable to such facts, and which lay the foundation of the decision to which the facts lead: Last-

ly, combining the legal principles and the facts, to state the grounds upon which the Court arrives at the sentence which will be pronounced.

The deceased party, John Farquhar, Esq. died on the night between the 5th and 6th of July, 1826, a bachelor: his nearest relations were nephews and nieces, viz. Mrs. Trezevant, a niece—the daughter of his only brother—consequently also his heiress at law, if under no legal disability to inherit,—Mr. Fraser and Lady De La Pole, children of a deceased sister—Mr. James and Mr. George Mortimer, Mrs. Lumley, and Mrs. Aitken, children of another deceased sister. These seven persons, his next of kin, are, if he died intestate, solely entitled in distribution of his personal estate, amounting to about 500,000*l.*: in addition to which the deceased had realty of about the value of 60,000*l.*; but the exact amount of either it is not material to ascertain.

In December, 1826, administration was granted to Mr. Fraser—one of the next of kin; and in November, 1827, that administration was called in by Mr. David Colvin, as an executor in an asserted will; the validity of which will and of two codicils thereto is the subject of the present suit.

The preliminary proceedings, for the purpose of getting in all possible testamentary papers, and of calling upon all parties who could have any interest in so large a property, necessarily took up some time. The first plea, which was substantially the commencement of the cause, was given in in February, 1828, and this great cause was brought to a hearing in January, 1829: so that all due dispatch has been used on all sides in pressing the question to a decision.

The will which bears date on the 7th of March, 1814, was executed at Calcutta in duplicate, and the original *factum* of it is in no degree controverted. The contents are in substance to the following effect. It bequeaths 500*l.* a year each to his nephew Mr. Fraser, and to his niece Lady De La Pole—several considerable annuities to friends—salaries to professors of the Universities in Scotland, beginning with Aberdeen, upon certain conditions—it directs two observatories to be erected at Aberdeen—and lastly it gives the surplus to the schoolmasters of Scotland, in sums of not less than 10*l.* annually, and appoints executors.^(a)

Such are the contents of this will, executed just before the deceased left India, in 1814.

Mr. Farquhar was born in the neighbourhood of Aberdeen about the year 1750, being from seventy-six to seventy-nine at the time of his death: he was educated at the Marischal College for the medical profession, and acquired some knowledge of chemistry; he went to India about the age of nineteen; was first in the army, in which he was wounded—then went to Calcutta, and having a taste for chemistry and science, engaged in the manufacture of gunpowder. In this undertaking his success was very great, and by that, accompanied with strict frugality, he in the course of a long residence (altogether about forty-five years) in India, amassed an immense fortune; it being supposed on his arrival in this country to have been equal, if not greater, than at his decease: for some of his subsequent speculations were not quite so successful.

During his residence in India, particularly for the last twenty-five years, and after the death of his parents, he appears to have kept up but little direct intercourse with his family. His brother had gone to Ame-

(a) The Court here read the will:—See *supra*, p. 114, n.

rica about the time or before he went to India; for in a letter to Mr. Wilson, in August, 1785, he says, "he (his brother,) went abroad when I was very young—we have never met since—I do not recollect much of him—he has left a daughter, now in London, under the care of his executors resident at Charleston:" and in subsequent letters, near the same period, he expresses much anxiety about the care of that daughter. In one of a still later date, in August, 1789, he speaks of her having gone back to Carolina. His sister, Mrs. Fraser, and her husband were dead, having left an infant son and daughter—two of the parties in this cause. It is not mentioned that Mrs. Mortimer, his other sister, was in correspondence with him. His confidential friend, the late Mr. George Wilson, the King's Counsel, was the person with whom he principally communicated upon all concerns, and particularly respecting his family; he was one of the executors named in this will; and a great number of the deceased's letters to him have been laid before the Court; to some of which it may be necessary presently to refer.

In 1814, upon reaching England, Mr. Farquhar took up his abode with Sir William and Lady De La Pole, his niece, formerly Miss Fraser, in Weymouth Street; but he afterwards had a house in Baker Street, and then removed to Gloucester Place, next door to Mr. David Colvin (who appears to have returned from India in the same ship with him;) and in 1823 he removed to a house in the New Road, where he died, as already stated, on the 5th or 6th of July, 1826.

After his arrival in England, he continued his correspondence with Mr. Wilson, who at that time had quitted the English bar and retired to Edinburgh. In these letters he complained of the want of occupation, and talked of employing himself with land; and in one of them, dated in 1815, he inquired about the mortmain laws, and whether they extended to Scotland: but he did not say a word of the will executed in India, nor of the disposition it contained. He soon after became a partner in Whitbread's great brewery, and also in the India Agency house of Bazett and Co., who were the correspondents of Colvin's house at Calcutta, and that agency house afterwards assumed the firm of Bazett, Farquhar, Crawford and Remington; he treated for, and at length purchased, East Mark estate in Somersetshire, notwithstanding the mortmain acts; and he sent for, or at least received one part of his will from India.^(a)

It seems rather extraordinary that, subsequent to 1816, the deceased in none of his conversations about a will ever mentioned, that one duplicate of his will was still remaining in India, neither to his partner Mr. Bazett, nor to his solicitor Mr. Drake, nor to his banker and friend Mr. Barnett, nor to Mr. David Colvin himself; for at the deceased's death it seems clear, from the whole conduct of Mr. Colvin, that he was ignorant of the existence of that duplicate: and though Mr. Colvin has pleaded, that the deceased declared he had a will in India, not a witness is produced to depose to the declaration except Jane Phillips, who, possibly, misapprehended the declaration; for the declaration spoken to by Mr. Wood is equivocal and will bear a different construction.

The fact however is quite clear and incontrovertible, that one duplicate of the will was in the possession of the deceased in England in 1816—the other duplicate was not known to be in India during the de-

(a) The phrase "Indian will" has reference, throughout the judgment, to the part transmitted to the deceased from India.

ceased's lifetime; it was produced there in the Supreme Court six months after his death, and though there may be no reason to suspect that it had not been there from the time of its execution in 1814, yet there is some reason to suppose that the deceased had forgotten the existence of such a duplicate.

In 1816 the deceased paid a visit to Scotland: his confidential friend Mr. Wilson was then dead, and these friends never met after the deceased's return to Europe. Before his journey to Scotland the deceased deposited in the custody of Mr. Bland, one of the partners at the brewery, a paper which he declared to be his will. Mr. Bland thus deposes to it: "Just before the deceased went to Scotland he called at the brew-house and speaking to the deponent who was then alone (and whom the deceased said he wished to speak to alone,) he asked for some paper and wax to seal up a paper which he brought with him; the deponent supplied him with the materials and the deceased then enclosed in a sheet of paper what appeared to be a single sheet of foolscap paper." The copy of the will itself is written upon a single sheet of foolscap paper, and therefore it might very easily have been so folded up. The deceased sealed the envelope, and as the deponent now best recollects wrote his name upon it without adding any thing further: he then delivered it to the deponent desiring him to take care of it for him, saying, 'God, Sir, you must take care of it, if any thing should happen to me that is my will.' Mr. Bland then states, "that he put the envelope into an iron safe, and the deceased after his return from Scotland called for it and took it away."

There seems no reason to doubt the sincerity of the deceased upon this occasion, nor that this was his will: there seems no reason to doubt that it was his Indian will; for no trace exists of his having at that time made any other: and here is the Indian will—a single sheet of foolscap paper—out of its original envelope, put into a new envelope, so that there have been at least two envelopes which have at different times inclosed this will: and finally, here is this will, whatever it was, traced back again into the deceased's possession, after his return from Scotland.

While in Scotland in 1816, he was about purchasing an estate—Balgonie,—but no purchase took place: he also made inquiries about professors and schools, and the state of education: Mr. Professor Davidson has been examined; and I will state the substance of his evidence.

"The deponent understood from the deceased that he had raised a fortune by means of saltpetre works and the manufacture of gunpowder and by great frugality, which he describes as not being natural to him but an acquired and fixed habit; he appeared to be a man of most uncommonly acute mind and of very varied knowledge." He says, upon a subsequent article, "the deponent saw the deceased not less than two or three times in each week,"—it is mentioned that he continued in Scotland about eight weeks—"the deceased's inquiries were twofold, the one relating to education in Scotland generally, and the other to the system pursued in the college: he inquired respecting the emoluments of the professors and teachers, and respecting the Universities of St. Andrews and Edinburgh (deponent having been at both); and for information respecting the Schools in Scotland not only in Aberdeenshire but in other parts of Scotland." He says, "the limited amount of the emoluments of the Schoolmasters excited some surprise, though the de-

ceased did not say that he purposed doing any thing for their benefit, yet he spoke of an increase as that which ought to be done." Upon the 11th article, he deposes, "that the deceased repeatedly said, he had made a will, though he did not say what the object of it was: the first occasion was when they and Professor Stuart met at dinner at the house of Mr. Burnet: the subject of wills being then introduced, the deceased said, 'that he had made a will, but he did not know whether it would be valid.'" And then the deceased referred to a case, which he had already mentioned in one of his early letters, of a will that had been set aside because the executors were directed to plant a species of tree with the branches downwards and the roots in the air.

This is the general substance of Professor Davidson's examination: and it thence appears, that while the deceased was in Scotland, in 1816, he in general terms mentioned that he had made a will, but gave no intimation of the tenor and contents of that will, and even expressed some diffidence of its validity: he made inquiries about professors and schoolmasters, and an observation, "that the salaries ought to be increased," but no declaration that he had done any thing or intended to do any thing himself for that purpose; nor entered into any consultation on the best mode and plan of effecting such purpose.

After the deceased's return from Scotland, and after again taking possession of his will, nothing more was seen or heard of it, nor of any other testamentary act till October 1821: not heard of; for, though he talked in general terms about the improvement of education in Scotland, he did not specify his plan nor refer to it as provided for by his will. Mr. Bazett the deceased's partner,—after speaking of the deceased's will being written for, and arriving as he supposes, in the year 1817 or 1818, and of its being in possession of the deceased,—goes on to state upon the ninth article: "that the deceased did frequently converse on the system of education in Scotland and the improvement thereof: the Greek language and mathematics were his favorite objects, and the study of the former in priority to the Latin; both these branches of learning the deceased frequently expressed a desire to advance in Scotland: he spoke of the deficiency of education in this respect generally, but more particularly in Scotland, and of his desire to correct and improve it in the schools of that country; it was a subject on which he undoubtedly took a great interest." He says upon the eleventh article, "Deponent never conversed with the deceased on the contents of his will in any respect as regarded the disposition of his property."

Mr. Drake also, his confidential solicitor, deposes on the ninth article, pretty much to the same effect: "Deponent heard the deceased speak of the system of education in Scotland being bad and as that which he wished to see improved; he spoke of such improvements as a subject on which he plainly took an interest, but so he did of education generally, and not particularly in connection with Scotland." He says upon the thirteenth article: "Certainly, on one occasion, the deceased asked the deponent in a loose general way, not as applying to any business before them or as relating to himself or his affairs, whether the statute of mortmain applied to land in Scotland: but the deponent never heard the deceased make any inquiry as to the effect and operation of the statute of mortmain on the disposition of property for the purposes of education."

Here, again, in these confidential conversations, was no reference to the will, nor to the specific plan which it contained.

The deceased went on with various speculations, some with profit, some with loss; he completed the purchase of the East Mark estate—with reference to which Mr. Drake mentions a circumstance that occurred in 1818. After stating on the eleventh article, “that for the East Mark estate, 10,000*l.* in part, was paid in March 1818, and the total purchase money including the 10,000*l.*, was 26,100*l.*: the conveyance was executed on the 14th July 1820:” he says on the thirteenth article, “that in March 1818, the deceased and he were coming together from Broad-street: as they passed along the Poultry, deponent, with reference to the purchase of the East Mark estate, mentioned to the deceased that it was proper he should make a new will, or republish a will if he had one that would pass real estate, as otherwise that estate would pass to his heir at law: the deceased said, ‘my heir at law, Mr. Drake, is a vagabond in the back settlements of North America.’”

“The deponent does not remember the same expression being used by the deceased at any other time; but he heard the deceased speak several times of his heir at law as being in America, because the deponent remembers having had conversations with him as to the right of such heir at law to inherit property.”

So that, in 1818, the deceased was distinctly apprized, that an after-purchased estate would not pass under his Indian will—but would go to his heir at law, and he was also aware doubts existed as to the right of that heir at law to inherit. Still he took no steps upon that information till October 1821, when, being about to proceed to Paris in company with Mr. Phillips, the auctioneer, a testamentary transaction took place, which it may be proper to detail.

Mr. Drake was at that time at Brighton. On the morning of the second of October, at Mr. Colvin’s house, while the carriage was at the door, the deceased produced the Indian will; made alterations in it, and wrote another testamentary instrument disposing of the East Mark estate, and some other real estate, and appointing new executors. The exact extent of the alterations in the Indian will or of the contents of the other instrument cannot be ascertained; for one is proved to have been destroyed by the deceased himself, and the Indian will is not forthcoming. The amount of the acts done upon that occasion must be collected in some degree from Mr. Colvin’s own statement and from his subsequent conduct. Now, according to his own statement, in the 12th article of his allegation, alterations and obliterations were made in the Indian will—to what extent is not set forth: and whether there were not former obliterations or insertions is not ascertained. It is disputed, whether the other instrument was written on the back of that will or on a separate paper: and I shall not further examine that point; merely remarking, that the weight of evidence seems to be that it was on a separate paper. It has been called a codicil, but there is no proof that it had any reference whatever to the will: it applied to separate after-purchased landed property. The subscribed witnesses have been examined; and Tosdevin heard nothing about a codicil: “something, he deposes, was said by Mr. Colvin, about what the deceased was writing being a part of a will he had made in India:” but Alleguen, the other witness, believes it was a will. “To the deponent’s recollection, it was a will the deceased then made and executed, for he thinks that it began—‘This is my last will and testament:’ and he remembers that the deceas-

ed's partners, (Bazett, Colvin, Crawford, and Remington) were nominated executors: though what else it contained he does not remember."

Mr. George Barnett says:—"in a conversation he had with Mr. Colvin on the subject of the deceased's will, (the deceased being at the time of such conversation, resident at Fonthill,) Mr. Colvin remarked, 'Oh, there is no will; there was something of a will, which he made when he went to France, but it has been destroyed.'" Colvin spoke of it therefore as a will, not a codicil. "The deponent observed to him, 'that perhaps it was safer or better that it was so, as his property would be divided among his relations:' to which Mr. Colvin made no reply. The conversation deposed to, was indelibly impressed on deponent's recollection, by the manner in which the observation he made was received by Mr. Colvin."

I may also in this place state what Mr. Tyrrell says to the same effect. "About May 1825, deponent went with Mr. Colvin in the *Enterprize*, steam vessel, and they conversed about the relations of the deceased; when Mr. Colvin told him, 'that he need not feel at all uneasy about his friend, Mr. Fraser, who would be very well off, for that the deceased would die intestate, and Mr. Fraser would be a rich man: Mr. Farquhar,' he said, 'cannot be persuaded to make a will.'"

I quote this evidence at present, not so much to show that Mr. Colvin thought the deceased intestate, as that the instrument of the 2d of October 1821, was spoken of by him and by the attesting witness as a will. I notice this the more, in order to explain what the deceased probably meant by his having made two wills; for, that he had any recollection of the duplicate in India does not appear in these proceedings: in my apprehension, therefore, when he spoke of having two wills, it is probable that he alluded to the Indian will, and the will which he made previous to his going to France. However the fact admitted is, that there were some obliterations and alterations in the Indian will, and that there was another instrument at this time executed, which is not proved to have been a codicil, reviving and confirming the will except so far as it was altered; but a testamentary instrument for a distinct object, viz. the disposition of landed property, and the appointment of a new set of executors.

The transaction having taken place in this hasty mode, the deceased set off for Paris, leaving these testamentary papers in the possession of Mr. Colvin. After his departure, Mr. Colvin, without any authority from the deceased, set about preparing an instrument which should consolidate this altered will, and this other will or codicil: he consulted and obtained the assistance of Mr. Drake, the deceased's solicitor, as to the form of the new instrument, and the latter, who had returned to town, wrote Mr. Colvin a full letter of instructions on the 4th of October, 1821.

"My dear Sir,

"In reply to your letter requesting some hints for the guidance of your friend in making his own will, I would suggest first, that by an act called the Mortmain Act, many restraints are provided against bequests for public charities, and in particular that devises of houses or land for such purposes, and also of all monies secured by the mortgage of houses or lands are absolutely void. In devises of this nature much professional skill is requisite; and therefore I cannot hope to give you such hints as may be safely relied on; but by way of a general caution, I would advise that your friend after framing his will in the clearest way he can,

for securing the objects of a charitable nature which he has in view, should add a clause something of this sort." And he then inserts the form of a clause which he recommends for the purpose. He afterwards points out that the word 'Heirs' is necessary in the devise of real property; that there must be three witnesses; and he remarks about a condition for changing the name, that caution should be used to devise the property over, and he then recommends a general residuary clause. In short, the letter contains full and intelligible directions and instructions for the guidance of Mr. Colvin and his friend.

There seems also to have been a draft perused and settled by Mr. Drake.

Mr. Colvin at length prepared, first, a sketch and then a draft, which latter he sent to the deceased at Paris, together with Mr. Drake's letter. The draft so transmitted is brought in by Mr. Phillips: it is paper A, allowed to be the paper prepared by Mr. Colvin from the Indian will and the other testamentary instrument, and sent by him to Paris.

It can hardly be supposed that Mr. Colvin would venture to introduce into this instrument, or exclude from it any thing except as he conceived in accordance with the deceased's intentions; those intentions being either collected from what was left in the old will, and contained in the new will, or gathered from confidential conversation with the deceased.

In this paper A, there are many alterations of the Indian will: it begins with the disposition for the improvement of education in Scotland—it alters the disposition of the surplus to the schoolmasters, by confining the bequest to the two counties of Mearns and Aberdeen, instead of the whole of Scotland. Even that plan, then, is in some degree altered, though the time when that alteration was introduced does not appear; it might be before or immediately after the deceased's return from Scotland. (a)

Other very material and extensive erasures may however be inferred. All the annuitants are omitted—not only those who were dead,—not only Mr. Fraser and Lady De La Pole,—but all his friends, and even his executors in India. It cannot be presumed, and it would be difficult to suppose, that these annuities were omitted by Mr. Colvin, unless he had found them struck through and erased in the Indian will: and, that they were struck through, seems to be confirmed from paper A beginning with the education plan, and ending with a new set of executors: for not only are all the original executors (except David Colvin) omitted, but a new set, the partners in the house of agency in Broad Street, are substituted, with a blank for the legacy—not the annuity—to be given to each of them.

If all these differences were taken from the Indian will, that instrument must have undergone much obliteration and erasure: there was nothing left of it but the education plan, and even that, I repeat, in some degree altered: slightly, but *non constat* when, altered: but every relation, every friend, every former executor is struck out. These circumstances will not be immaterial, when the Court comes to consider whether the old duplicate can, in point of law, be again set up; and also when it comes to consider the probability or improbability, in point of fact, whether the deceased should or should not himself destroy this instrument.

(a) See paper A, ante, p. 114. n.

Among other erasures Lady De La Pole's annuity was erased; so Mr. Colvin expressly states the fact: yet paper A shows that it was not so omitted with the intention to exclude her from any provision, but to substitute a legacy in the place of the annuity: and not only a legacy to Lady De La Pole, but legacies to each of her children. It stands thus in paper A: I give to my niece Lady Pole, wife of Sir William Pole of Shute in Devonshire, the sum of _____, and to each of her children the sum of _____, to accumulate for their benefit till they arrive at the age of twenty-one years." So that here is not only an intention to benefit Lady Pole and her family, but those intentions are thus detailed; and, not only so, but the deceased intended to give a legacy to his niece in America: for the paper goes on—"I give to my niece Mrs. _____, in America, the sum of £ _____."

This niece, Mrs. Trezevant, was his brother's daughter—his heir at law, if not under a legal incapacity to inherit; and since the deceased had by devising the landed property to the Mortimers, deprived her of what the law might possibly give her, and had directed them to take the name of Farquhar; he now, it would seem, intended to give this niece a pecuniary legacy; nor was it at all improbable that such should be his intention. But at present, I only point out the fact of these alterations, and will hereafter consider their effect upon the real question at issue.

Upon the receipt of this document at Paris, the deceased abused Mr. Colvin in no very measured language, if Mr. Phillips, who is Mr. Colvin's own witness, is to be credited; and in this respect his account is not improbable, for the deceased was irritable, and when in anger did not care what he said of, or even to, any person.

Mr. Colvin soon afterwards went to Paris, and he and the deceased were again upon good terms; it might be convenient to both: but the deceased never adopted paper A, nor executed any will to that effect; he never in any manner expressed his approbation of its contents, nor ever did any act again giving effect to the education plan which it contained, or to any other testamentary disposition whatever.

The subsequent history of paper A is not exactly traced: it is in some degree mysterious; it never was seen in the deceased's possession after its receipt at Paris; it has been introduced late into the cause, and no less than six different copies of it have been produced. The precise history bears too little on the main question to require my entering into a further consideration of, or detailing the evidence applying to, it after its arrival at Paris. Mr. Drake's letter, however, which accompanied it, remained in the deceased's possession, and was found among his papers after his death: so that, from the arrival of that letter at least, the deceased was pretty fully aware of the operation of the mortmain laws.

The estate of Marshal Bessieres being on sale, while the deceased was at Paris, he seems to have entertained some thoughts of becoming the purchaser: whether to avoid the mortmain act—whether to have property in different countries—whether as a mere speculation, and to employ his capital, does not appear: however, the purchase was not made.

Soon after the deceased's return from Paris in January 1822, the Indian will and the testamentary instrument of October 1821, were returned to the deceased in his iron chest: the iron chest was sent to his house and the key was delivered to him. Mr. Colvin so pleads the fact and so states it in his affidavit of scripts. Thus, the Indian will is traced

back into the deceased's own custody and possession, in his iron chest, and it was never afterwards seen by any human being, unless it was on the same paper with the document of October, which it is admitted and proved was afterwards destroyed by the deceased himself. Mr. Bazett gives this account of the destruction of it.

"After Mr. Farquhar's return from France, he, the deponent, and Mr. Colvin were at breakfast together: and the deponent's attention was excited by hearing the deceased say, that something (deponent did not hear what) was very absurd: this was an expression which the deceased was continually using: just afterwards, Mr. Colvin on leaving the room and in the act of leaving it, turned round and said to the deceased, that 'he, the deceased, was very fond of saying how absurd other people were, but that really no person was more absurd on some occasions than himself,' or to that effect: at which the deponent observed immediately that an angry feeling arose in the deceased, who said nothing about it then but presently afterwards left the house evidently in displeasure. The deponent and Mr. Colvin went together into the city, and he was with him in Broad Street in the room where the partners usually sit, when, in the course of an hour or two after they had got there, the deceased came in, to the surprise of the deponent, as he seldom came there. Without noticing Mr. Colvin he came up to the deponent and telling him that he wished to speak with him, they went together into an adjoining room, where the deceased, producing a paper writing, reminded the deponent of what Mr. Colvin had said at breakfast and expressed a wounded feeling in consequence; he pointed to the paper he held in his hand, and saying, 'you may tell your friend David what he has lost,' he tore the paper several times and threw the pieces into the fire or under the grate."

Mr. Bazett then interfered between those two gentlemen and he reconciled them. He identifies the paper as the instrument of the 2d of October 1821, by adding, "it was that and that only."

Here, then, the deceased himself at all events destroyed the paper (which, for convenience I shall call the codicil) of October 1821; he became intestate as to his real estates: East Mark, and the rest of his landed property, would go to his heir at law; the Mortimers and all his other relations were wholly excluded; the newly appointed executors—his partners in England—were all revoked; if the Indian will, altered and erased as it was in part, was preserved by the deceased. It is admitted to have been in the deceased's own possession and custody at this time: it must have been in his hands on this very occasion and under his notice; for the two instruments were together. The conclusion as to its subsequent existence will depend upon what afterwards took place: it was never, as I before said, again seen, though the deceased lived about four years.

The subsequent acts and conduct of the deceased in regard to his property and to his relations, his declarations and the general presumptions and probabilities of the case, will require to be accurately examined hereafter, but at present the remaining history need only be stated generally.

In the latter end of 1822 the deceased purchased the Fonthill estate at the price of 300,000*l.* whether upon speculation, whether he ever meant to retain it, whether he afterwards resolved to dispose of it on account of the statutes of mortmain, or for other reasons, cannot be ex-

actually ascertained: he remained in possession of it for three years and contracted for the re-sale of most, if not all, of it in December 1825. Mr. Drake's account of the purchase of that and other property will be sufficient for the present purpose. "The deceased had (as respondent believes) entered into a legal contract for the sale of the whole of his estate at Fonthill some time previous to 1826: he purchased that estate in the year 1822 and gave for it some such sum as 300,000*l.*—the first contract for the re-sale, of which he has any knowledge, bears date 22d December 1825. There were three subsequent contracts on the 27th and 30th December 1825 and 2d June 1826. The deceased, in May 1823, purchased a freehold estate of Mr. Bennett in Wiltshire and Dorsetshire, for the sum of 100,000*l.*—whether that or any part of it was re-sold respondent knows not. In June 1824 the deceased lent 2,300*l.* on mortgage: in Oct. 1824—20,000*l.*:" Mr. Drake mentions some other assignments of mortgages taken by the deceased.

The purchase of Fonthill seems to have been made through the agency of Mr. Phillips, the auctioneer: he was employed to sell "the splendid ornaments and other valuable effects" in the following year: he also was employed as agent in the management of the estate. In order to secure the performance of an agreement entered into between him and the deceased respecting these concerns, he procured the deceased to execute an instrument prepared by Phillips' own solicitor in the form of a memorandum addressed to the deceased's executors, appointed or to be appointed.

This memorandum, after shortly noticing the purport of the agreement, proceeded: "Now in the event of my death, I do hereby direct that the said agreement and every part thereof shall be carried into effect and be performed by my executors, as well already named as hereafter to be named as fully and effectually as if I had lived;"

"I further declare this memorandum shall be considered a codicil to be added and taken as part of my last will and testament either already made or hereafter to be made, notwithstanding the same is not annexed thereto." This instrument addressed, not to any executors by name, but any appointed or to be appointed, and called a codicil to a will already made or to be made, and obtained in the manner, and for the purpose, that it was obtained, does not bear materially on the present case: it does not infer the probable existence or previous destruction of any will: it has been mentioned inadvertently, since, if wholly unnoticed, it might seem to have been passed over.

Mr. Farquhar becoming dissatisfied with the conduct of Messrs. Phillips, they were dismissed from the agency at Michaelmas 1824, and suits at law and in equity took place between them and Mr. Farquhar, which continued unsettled down to the death of the latter.

On the dismissal of the Messrs. Phillips he intrusted the management of his concerns at Fonthill to, and seems to have reposed great confidence in, Mr. George Mortimer, one of the devisees of the East Mark estate in the instrument of October 1821. This nephew was engaged in a woollen manufactory; and the deceased, on going to Paris, gave him a large credit on his bankers. In 1824 he induced him to erect a factory on the Fonthill estate, though it was represented by his friends as very injurious to the property, and he granted him land and lent him money for the undertaking.

The instruments, exhibited in the 19th, 21st, and 23d articles, which are fully confirmed by the depositions, satisfactorily show these facts.

It appears that in 1823 the deceased removed from Gloucester Place, where he had resided next door to Mr. Colvin, to a house in the New Road, and at that place and at Fonthill he lived till his death. Mr. and Mrs. George Mortimer were inmates at Fonthill; they resided there principally, except that in the spring of 1826, Mrs. Mortimer came up to lie-in at the deceased's house in the New Road, and returned, as soon as it was prudent to travel, to Fonthill. There are exhibited a great number of the deceased's letters, both to Mr. and Mrs. George Mortimer, written quite in that unreserved stile which would naturally belong to such a near and confidential connexion. I should also have mentioned that Mr. James Mortimer, who had engaged in building some houses in Scotland, was also liberally assisted by the deceased with money to carry on that undertaking. (a)

These are some of the facts relating to the conduct of the deceased in respect to his property, and in respect to his relations, between 1822 and his death: and at present it will be sufficient further to state that he went to bed not quite well on the evening of the 5th of July 1826, and the next morning was found dead in his bed.

His friend and partner, Mr. Colvin, and his solicitor, Mr. Drake, were immediately sent for, and they sealed up all his repositories; and on the next morning those repositories were carefully searched by Mr. Colvin in the presence of Mr. Drake and Mr. Fraser: Mr. and Mrs. Mortimer being at Fonthill and not arriving in town till that evening after the search had been made. The deceased's keys were discovered placed in the situation where he usually kept them; two keys, in particular, it was his habit to tie up in separate corners of his handkerchief and place under his pillow; and in that usual situation those two keys were found after his death. No will was found. The only paper, in any degree of a testamentary nature, was an envelope which had contained either "a will" or "the copy of a will."

Four witnesses speak to the finding of that cover: the first is Mr. Drake: "On the day after the death, when search was made, some few papers were found in a cabinet in the deceased's sitting room; one of importance, being a bond of David Colvin's: a cover or envelope was there, endorsed 'will of John Farquhar, Esq.' which, as well as deponent remembers, was locked up in the drawer." He does not, therefore, speak very positively to the envelope being in a drawer within the cabinet.

Neile, a servant, says: "Deponent was present when the cover of the will was found after the deceased's death; it was found by Mr. Colvin in a drawer, the upper one or next to it of several drawers on which stood a cabinet."

Hasler, another servant who was present, states, "that the cover of the will was not found in the (brass-bound) cabinet, but was found in one of some drawers, not in a cabinet: the deponent saw the cover, there

(a) "Dear James,

London, 28th June 1825.

"Having agreed to pay for the new houses intended to be built at Ferry-hill, I hereby authorise you to contract with the different artificers necessary, and to draw upon me for the charges of the work as it may be necessary for materials and labour.

"I am, dear James, yours truly,

"J. FARQUHAR."

was written on it 'The will of John Farquhar, Esq.' The room was almost full of cabinets, drawers, tables, boxes, and all kinds of articles."

Blakemore, a carpenter, states, "The envelope of the will was not found in either cabinet but in a drawer in the corner of, and at the other end of, the room, near the outer room."

These are the four witnesses to the finding of this envelope; and the evidence therefore is, that it was found, not in the iron chest, not in any cabinet, but in a drawer. That paper has been accidentally not preserved, nor does it appear of much consequence how it was endorsed: whether it was the envelope that covered the will when it came from India, whether it was the envelope in which the deceased enclosed that will in Mr. Bland's presence, whether it was the envelope that accompanied it in the iron chest when returned to the deceased, or the envelope of any other paper, is neither easily ascertained nor of much importance. The deceased himself took the codicil out of the iron chest in order to destroy it; and this envelope was not found where the Indian will was last seen. Whatever envelope it was and in whatever place it was found there is no proof, nor does it seem to me there is just ground to suspect that it was not placed there, or accidentally thrown or left there, by the deceased himself.

Here, then, are some of the leading facts which hardly admit of controversy. The duplicate of the will propounded was never seen after the year 1822, and even then it was materially altered: it was at that time in the possession of the deceased, in an iron chest, of which he had the key: it was not found either there or elsewhere at his death.

Upon these facts it seems proper to consider what is, *prima facie*, the presumption of law? Who did the deed? Who was the person *prima facie* that destroyed this instrument?—and upon that point there appears to be no solid doubt. It was in the deceased's possession—it was not to be found at his death: the first presumption is, that the deceased himself destroyed it: if that presumption of fact be not repelled by evidence, then the legal consequence will also *prima facie* be, that the duplicate remaining in India is revoked.

This presumption of fact, and this legal consequence may be rebutted by satisfactory evidence; but the burthen of proof lies upon the party setting up the will—whether he sets it up by propounding a draft, a duplicate, or a cancelled will; for whether the paper be found cancelled, or whether it be wholly removed and not found at all, still the first presumption as to the person who did the act, is the same. The force of the presumption and the weight of the *onus* may be different according to circumstances; but the Court, in order to pronounce for a draft or a duplicate, or a cancelled will, must be judicially convinced, that the absence or cancellation of the paper once in, and not traced out of, the deceased's own possession, was not attributable to the deceased. This negative may be established by a strong combination of circumstances leading to a moral conviction that the deceased did not do the act, or it may be established by direct positive evidence in different ways, such as by proving the existence of the instrument after the testator's death—by proving that he himself destroyed it when of unsound mind, or by error, or under force *sine animo revocandi*,—or by proving that it was fraudulently destroyed by some other person: but under this last supposition the proof must be clearer, because a fresh presumption arises—the presumption in favour of innocence: for if a fraud is charged, it

must be clearly proved by facts and circumstances leading to a conclusion of guilt.

All these presumptions, if they come to be analysed, may be resolved into the reasonable probability of fact, deduced from the ordinary practice of mankind, and from sound reason. Persons in general keep their wills in places of safety, or, as we here technically express it, "among their papers of moment and concern." They are instruments in their nature revocable: testamentary intention is ambulatory till death; and if the instrument be not found in the repositories of the testator, where he had placed it, the common sense of the matter, *prima facie*, is, that he himself destroyed it, meaning to revoke it: and if he destroyed the part in his own possession, the common sense of the matter again is, that he also intended to destroy the duplicate not in his own possession.

It was argued on behalf of the executor, that the burthen of proof lay on the next of kin, that they must show, affirmatively by evidence, that the deceased himself destroyed the instrument. The doctrine is new, and no authority was given to support it; and the Court cannot venture to adopt it without authority, and against authority. The passage quoted from Swinburne, seems to be quite in the opposite direction:—"What, if the testament be found cancelled and defaced, but it is not known who did it? To whom is this act of cancelling or defacing to be attributed? to the testator who made it or to some other, who otherwise, peradventure, might be hindered by it?"

He then puts the arguments and authorities on each side,—"It seemeth not to be reputed the act of the testator, for change of mind is not to be presumed, especially where a man has done a thing with deliberation and resolution: on the contrary, it seemeth that it ought not to be accounted the act of any other, for that were to presume a fraud and deceit, which ought not to be presumed unless it be proved." He then proceeds to state his own opinion: "In this controversy, therefore, I suppose that the person in whose custody the testament is found is to be adjudged to have done the act, whether it be the testator or another," Swinburne on Wills, part 7. s. 16. p. 992, 3.

The opinion then of Swinburne is, that *prima facie* the act is done by the person who is in possession of the instrument: but this *prima facie* legal presumption may be rebutted by the circumstances, upon a full examination, creating a stronger presumption the other way; and it seldom happens that cases, which set out upon certain legal presumptions, require to be decided upon the mere presumption: the general circumstances of the case usually lead to a tolerably satisfactory conclusion of the real fact, either by confirming, or by repelling the legal presumption. The correctness of Swinburne's principles is affirmed by adjudged cases.

The Court, for personal reasons, is unwilling to rely upon any authority derived from the decisions in this place within the last twenty years. It will be sufficient to say, that I see no reason to depart from the doctrines laid down in the cases quoted within that period: but though the point hardly requires authority, I will shortly refer to the decision of Sir William Wynne, in the case of Freeman v. Gibbons, in the Prerogative Court, Easter Term, 1793, stating the words of that learned Judge from my own note.

Per Curiam. "Heads or instructions are propounded by Lydia Gibbons as the residuary legatee, and it is proved that the deceased exe-

cuted the will on December the 1st, and died on the 10th." So that the will was only made nine days before the death. "But the executed will cannot be produced, and it is said to have been destroyed after the deceased's death: if that can be proved the instructions may be pronounced for. Two witnesses speak to declarations of the deceased, recognizing the existence of the will a short time before his death: this affords strong presumptive evidence that he adhered to the will, but not conclusive proof, for the declaration may have been insincere." The usual want of sincerity in such declarations, I shall have occasion again to notice. "The two persons to whom the declarations were made are, one the brother-in-law; the other the son-in-law of Gibbons. The will was deposited in the drawer of the bureau; and it is not alleged that the deceased was not able to go to the bureau after the execution. Recognitions, because they may be insincere, are no proof of the fact that the will was in existence at that time: it may have been destroyed before: it is proved that the deceased was up, and looked out of the window three or four days before his death." Under these circumstances, there being a possibility and ability on the part of the deceased to have destroyed the will, Sir William Wynne pronounced against the instructions propounded.

In *Baumgarten v. Pratt*, in the Prerogative Court, Easter Term 1796, the same Judge pronounced a similar decision. In that case there was a draft produced: the Court said;—"A draft may be pronounced for; but it must be proved either that the will remained entire at the death, or, if destroyed in the life time, that it was done without the knowledge and approbation of the testator: the presumption is, that it was destroyed by the deceased:" and in that case the draft was pronounced against.

Now these are authorities which go further back than the last twenty years, deciding that the presumption is, where a will is not found, that it was destroyed by the deceased himself.

If, however, we should from the evidence arrive at the fact, that this will was destroyed by the deceased himself, the legal consequence cannot be disputed, that, *prima facie*, the duplicate is also destroyed. That point has been settled in a variety of cases: it is hardly necessary to refer to them. It was so decided in *Sir Edward Seymour's case*:—in *Limbery v. Mason*, 2 Comyns, 453, and it is as expressly laid down in *Burtenshaw v. Gilbert*, 1 Cowper, 54, where Mr. Justice Aston, after Lord Mansfield had gone through the case, said, "if the duplicate of the will had still remained in the hand of the person to whose custody it was originally intrusted, yet the cancelling that part which the testator had in his own possession, would have been a sufficient cancelling of such duplicate." In *Pemberton v. Pemberton*, 13 Ves. 308, Lord Chief Justice Mansfield, Lord Eldon, and Lord Erskine, in different stages of the cause, all held the same doctrine. So in *Welsh v. Gowland*, Prerog. Mich. Term, 1804, Sir William Wynne said—"it is an admitted rule that the cancellation of a part, in the testator's possession, would be the cancellation of a duplicate in the hands of another person."

The reason of this rule is obvious; for why should a person destroy or cancel the duplicate of his will, if he meant the other part to operate? It may, indeed, be shown that it was done *diverso intuitu*, or by accident, or while of unsound mind, or for the sake of peace, and to deceive and impose upon persons who were importuning him; but, *prima facie*, the cancellation or destruction of the part in possession infers the revocation of the duplicate.

The main question of fact, then, to be examined is, by whom was this will destroyed? *Prima facie*, by the deceased himself who was in possession of it; and the executor setting up the duplicate must, as I have said, show either by direct positive evidence, or by circumstances, producing a strong moral conviction, that it was not done by the deceased. The executor and his legal advisers seem clearly so to have understood the case by the very course of conducting this suit: they began not merely by pleading the *factum* of the will at Calcutta—which was never denied—but by giving a long allegation consisting of twenty-eight articles, setting forth circumstances from which it was to be collected, that the deceased had not destroyed the will himself. The allegation commenced with the earlier history of the deceased's intentions, from which his adherence to that will was to be inferred: it pleaded the continuance of his intentions to dispose of his fortune in improving education in Scotland; quarrels with, and disaffection towards his relations; and declarations recognizing the existence of this will to the very end of his life: from all these circumstances, inferring that the deceased himself would not have revoked this will, and thereby repelling the legal presumption.

But the allegation went further: for it pleaded circumstances to show that it was destroyed by another person—not by accident—not by fire—not by inadvertence,—but by a fraudulent spoliation—by taking it out of the deceased's repositories in his life time: and though no direct act of spoliation was charged, so that it could be met and contradicted, yet without specifying any time or place or circumstance attending the act of spoliation, it was insinuated too plainly to be misunderstood, that Mr. and Mrs. Mortimer, or rather Mrs. Mortimer was the person meant to be charged. This is a serious moral offence, and in support of such a charge, pretty clear proof should be adduced: the presumption is in favour of innocence: but if this charge be proved there is an end of the case, and it is of a personal nature so important, that I shall first consider the circumstances and evidence in support of such an imputation.

It is alleged, that particularly for the last year of his life, the deceased was in the habit of leaving his papers and keys about, and his repositories unlocked, and that Mr. and Mrs. Mortimer were often at his house in town when he was at Fonthill. If this were all true, it would prove nothing; for the will may have been destroyed three years before: but the facts are not quite truly laid, for though the deceased might sometimes omit to lock up his papers, yet in general when his papers lay about he locked his room door: if papers of some importance were occasionally left, yet no testamentary paper was ever seen—not even the envelope: and of some of his keys and repositories he was particularly cautious.

What then would these circumstances amount to? That there was a possibility of a spoliation being committed, which possibility cannot and need not be denied: but the possibility of committing a crime, unless followed by acts done, affords not the slightest proof that the crime has been committed. No person was ever observed at the iron chest, where the will was last seen—no person at the brass-bound cabinet where the envelope is supposed to have been found—if found in any cabinet at all. The charge really comes to the evidence of Mrs. Hurst, who probably was the only cause that it ever was insinuated.

This witness—who is an undertaker and upholsterer, carrying on busi-

ness near Storey's Gate, and who had been employed in her business by Mr. and Mrs. Mortimer to the amount of 400*l.* or 500*l.* and who was in very distressed circumstances;—thus deposes. “In December 1826, whether before or after Christmas she cannot say, but just about the time the administration issued,—deponent called upon Mrs. (George) Mortimer, to speak to her on the subject of the administration and sureties: Mrs. Mortimer told her that her husband was out of spirits and wished to decline having any thing to do with it, but that she was averse to this, and told the deponent, that it would be doing her the greatest favour if she could prevail on Mr. Mortimer to insist on being joined in the administration. The deponent then asked her, ‘how Mr. Fraser would feel about it—whether he would be angry;’ to which Mrs. Mortimer replied, ‘Oh! I don’t care about that, they are all indebted to me for every farthing; for I destroyed the will.’ These were, as the deponent believes, the precise words: no other person was present, but Mr. Mortimer came into the room immediately afterwards, and the conversation was discontinued. The deponent had no explanation from Mrs. Mortimer at any time whatever of what she meant, but it did not strike the deponent that Mrs. Mortimer did mean to say that she had done any thing wrong thereby.”

This is a very safe mode of attempting to fasten such an imputation, for it affords no possibility of contradicting it. However doubtful might be the admissibility of such evidence,^(a) yet the Court considered it an act of injustice to Mrs. Mortimer to get rid of this testimony on that ground.

It seems hardly necessary to state many reasons why the Court cannot venture to give credit to Mrs. Hurst: she is examined as a witness in April, 1828: the words are supposed to have been spoken about Christmas 1826, fifteen months before—yet she pretends to relate the precise words—they are not accompanied with any explanation—there are no circumstances which should prevent misapprehension nor confirm their sincerity—they are spoken just at the end of a conversation, as Mr. Mortimer came into the room. The words themselves are equivocal—they will bear the interpretation—that the deceased’s regard and sense of Mrs. Mortimer’s attentions had induced him to destroy his will, or to make no will, or not to make a will excluding Mr. Fraser.

If Mrs. Mortimer had been guilty of a fraudulent spoliation of this Indian will, or of any other will, it is almost impossible that she should not be aware she had done something wrong; and it is highly improbable she would have disclosed it in this abrupt and unnecessary mode: for there was no inducement. The suggested ground-work and motive to the conversation are improbable and untrue,—improbable, that Mrs. Mortimer would employ this distressed upholsterer to try to get security in this large amount,—untrue, that it was necessary for Mr. Mortimer to insist upon being joined in the administration; for there was no dispute about the administration at this time: it had been agreed that Mr. Fraser and both the Messrs. Mortimer should take it jointly, and an agreement to that effect had been signed by all parties so long before as the 10th of November preceding, that is, seven weeks before Christmas; whereas Mrs. Hurst says, “whether before or after Christmas she cannot say:” so that it was about Christmas she lays the conversation.

(a) See note, *supra*, p. 118.

This is still further improbable, and must be incorrect, because the administration to Mr. Fraser actually passed the seal on the 15th of December. The whole story is therefore very loose and improbable; and the ground-work of the conversation is apparently unfounded.

What, too, is the credit and character, and conduct of this Mrs. Hurst? and how did she act? She states, "it did not strike her that Mrs. Mortimer meant to say she had done any thing wrong." But is it credible, that if she had destroyed this will, she should not have been conscious of having done that which was wrong? the witness indeed could not, at the time, have understood Mrs. Mortimer as intending to say she had fraudulently destroyed the will; nor have thought that any thing improper had been done; for she mentioned nothing on the subject for six or seven months.

This person had, as I have observed, been employed by Mr. Mortimer, as an upholsterer, in fitting up a house: she had been paid her money on account from time to time as the work was going on, so that at the end of it very little was due, and her bill was not quite satisfactory: and in June, 1827, she was in very distressed circumstances, and requested Mr. Mortimer to lend her money on mortgage, and to accept bills for her accommodation, which he declined to do.

There are four of her letters exhibited; three, dated respectively on the 6th and 14th of June and on the 14th of August, 1827, are addressed to Mr. Mortimer; the first requesting his advance of the money on mortgage and offering 10 per cent. interest; the two next pressing him to accept the bills. From the fourth letter, dated the 22d of August, it should seem that Mr. Mortimer not having even returned her an answer, she wrote to Mrs. Mortimer for her good offices; but did not, in the slightest degree, suggest that she was in possession of any secret that might be the means of influencing Mrs. Mortimer. At length, not getting any pecuniary assistance from Mr. Mortimer towards the latter end of October 1827, an anonymous letter was sent to Mr. Colvin, that Mrs. Hurst could give important information about Mr. Farquhar's will, she was applied to by Mr. Colvin's solicitor and was brought forward to give this evidence: her memory is not very accurate, for in answer to the ninety-eighth interrogatory she does not quite recollect her own letters: "She did at one period but not, as she believes, in 1827 apply to Mr. Mortimer to lend her 400*l.* on mortgage, offering to pay him an interest of 10 per cent. thereon." Yet here is her own letter making the application and the offer. "Respondent has no recollection of having been in August 1827 in fear of being arrested by four different persons at the same period of time;" and yet here, again, is her own letter, dated in August 1827, and stating expressly her fears of being arrested by four different persons. In short no sort of reliance ought to be placed on her evidence. It is therefore a matter of justice due to Mrs. Mortimer to declare, not only that the imputation is not proved, but that she stands wholly acquitted of it.

No direct proof being then adduced that the will was destroyed by some person other than the deceased himself, the case rests upon the general circumstances in order to show, that the improbability of a destruction of this will by the deceased himself is so great, as to lead the Court to a moral conviction that it must have been destroyed by some other means: of which certainly there was a possibility.

To induce the Court to arrive at the conclusion that such was the

case, the grounds taken appear to be the following: first; that, long before making the will, the deceased had conceived so strongly the intention of devoting the bulk of his fortune to the improvement of education in Scotland as to render it highly improbable he should afterwards depart from that intention: secondly, that after his arrival in England he sent for his will from India—went into Scotland to make inquiries, and still expressed the same intentions respecting the improvement of education in that country—quarrelled with Mr. Fraser,—and that the will was in existence in the beginning of 1822: and lastly, that though no direct proof can be adduced of its subsequent existence, yet by declarations down to the time of his death the deceased recognized its existence.

Upon the first head—the probability *a priori* of adherence to this will—it is to be observed that the proof of general intention to promote and improve education in Scotland goes only a part and not the whole length of the case: the fact to be proved is,—the existence of the will, and that proof is to be deduced from adherence to this identical disposition, and to the plan contained in this very instrument. It is quite consistent with the destruction of this will that he should alter his plan, meaning still to a certain extent to promote Scotch education, and benefit Aberdeen professors and schoolmasters by the making of another will; but that will might also contain other provisions. The probabilities, therefore, must be examined more closely and with a view to the precise point to be proved.

It is true that in his letter to his friend Mr. Wilson, in November 1790, he mentions “having wished his father to warn his distant relations against any ridiculous notions of inheriting his fortune, for that he should leave it to a public institution:” and in another letter to him in August 1791, he adverts to “a scheme he had long had in view to leave his fortune, in case of accident, to the University of Aberdeen, in order to double the professors of what are, in his opinion, the most useful branches of science, so that they might be taught during the whole year.” This plan seems to be, to double the number of professors, and not to double the salaries of each, though it comes nearer to the disposition of the will than the crude idea in the former letter: it is in this last letter, that he adds,—“I have stated my project to some of my friends, who treat it with every mark of disapprobation, thinking I should do as great injustice to nephews and nieces, whom I never saw, as if I were to rob them of their birthright.”

He was therefore not much confirmed in his intentions by the opinions of his friends in India, nor does he seem to have had more encouragement from his friend Mr. George Wilson; since he did not mention nor allude to the subject again for near ten years—till January 1800—and then not directly or explicitly. He then mentions intending to leave his niece an annuity of 500*l.* rather than a sum of money; this may reasonably infer his intentions to leave the bulk of his fortune to other objects—to Scotch education: but he also says, “that your opinions should have changed I own surprises me, but I must wait until we meet to learn the extent of the change: I certainly have looked forward to our meeting as one of the happiest objects of my life.” That meeting never did take place: but there is strong reason to suppose, that Mr. Wilson concurred with his other friends in disapprobation of the plan, from this circumstance, viz. that the deceased never again wrote to

him upon the subject, though he remained fourteen years longer in India.

The fact, however, is, that just before his departure from India he put his plan into the form and shape of this will, expressly stating that he was "about to embark for Europe;" and Mr. Colvin in his answers thus describes the mode of preparing this will: "that one part of the will and codicil was written from the dictation of the deceased by Alexander Colvin, (to whom the deceased enjoined the greatest secrecy as to the contents), and that the other part thereof was immediately copied by the said Alexander Colvin therefrom."

There seems then to have been but little previous preparation for making this will; and though the subject may have been long floating loosely in his mind, it appears to have been done rather hastily at the last. How had his plan been digested and matured? He had been absent from Scotland forty-five years—left it when a youth of nineteen—in 1800 he mentioned a scheme of "doubling the professors"—his friends disapproved his plan as injurious to his relations; he made no inquiries, as far as appears, about the actual state of education in Scotland or at Aberdeen in particular; but with his own crude recollections and notions—upon the point of embarking—he dictated this will, containing his scheme for devoting to this plan his immense fortune—giving the whole of it away from his family, except two annuities of 500*l.* each to a nephew and a niece whom he had educated.

Resting here, this will *modo et forma* was not very likely to be adhered to in all its details when he came to Europe, and had an opportunity of further consideration and of more exact inquiries upon the spot: on the other hand, although in his letter of 1791 he did not admit the rights of his nephews and nieces "whom he had never seen;" and that in 1800 he talked of leaving his niece, Miss Fraser, only 500*l.* a year—when it must be remembered his fortune was of course much less; yet he was not by any means destitute of family affections: his letters to Mr. Wilson, from 1784 to the very time of his leaving India, fully prove this: he furnished supplies to his father and mother so long as either of them lived: upon hearing of his brother's death in America, leaving an only daughter—the present Mrs. Trezevant who had come to England for her education—he was very anxious for her protection: his sister Mrs. Fraser, and her husband were both dead leaving two children, now Mr. Fraser and Lady De La Pole—he took charge of their education—he intrusted this to his friend Mr. Wilson, not in a cold and niggardly way, but in a manner that showed strong natural affection for them.

I do not think it necessary to quote the numerous letters from the deceased to Mr. Wilson; they were pointed out in argument; and a reference to a very few passages will for the present purpose be sufficient. In a letter of the 6th of March 1800 he thus writes: "I wish my niece might be sent to Bath in order to avoid the inconvenience you mentioned to me. Mrs. Bebb had been so good as to say that she would see her. I hope, when you send her, you will take care that her dress be suitable to the niece of a person of my fortune."

In 1808 he writes, "Should my nephew have made any considerable proficiency in the mathematics and have an inclination for the army, I do not know whether an appointment for the Engineer Corps here would not be the best line for him. But should he wish to remain at

home I hope you will act respecting him as you would in the case of my decease."

Again in 1810, "I need not trouble you respecting my nephew and niece, hoping to be so soon with you, but should I not arrive I request you will act for them as you would for your own children, and I give you, as I have always done, the fullest powers."

Now, these letters mark the affection subsisting, even in India, towards his nephews and nieces, when he "had never seen them." What took place when he came to England? He went to Lady De La Pole's house, and domesticated there for a whole year: she soon after was confined, and he stood godfather to her child; and his letters to Wilson show that he was quite satisfied not only with her, but also with his nephew Mr. Fraser, and with his progress and diligence in his profession. To Wilson, in a letter of the 10th of December, 1814, he thus expressed himself: "Lady Pole wrote to you some days since—she feels great gratitude for your attention to her. John seems studious, and, although at a distant time, will I hope succeed in his profession; he however much regrets the loss of your advice and assistance." He therefore did not disapprove of their conduct, nor was he disappointed in his first impressions.

Mixing thus in family society, satisfied hitherto with the behaviour of his nephew and niece, engaging in the concerns of this country, in the brewery, in his agency partnership, and in various speculations to employ himself and his great capital, observing the conduct of, and the example set him by, the rest of the world, and that great institutions for the benefit of society were erected and supported by the small contributions of the many, and not by the sacrifices of a single individual to the exclusion of the claims of family connexions; is it at all improbable, that he should begin to doubt and hesitate about the execution, in all its details, of that plan to which his Indian will had devoted his property? For what did he do? he sent for his will from India—he, in 1815, treated for the East Mark estate—he went to Aberdeen in 1816, his friend Wilson being then dead—he made inquiries about professorships and schools; but he did not in the slightest degree impart his plan nor confirm his intentions; nay, though he mentioned incidentally, that he had made a will, yet he did not disclose even its general object. All these circumstances tend to render it by no means improbable, that he meant at least to revise and reconsider, and did not contemplate an exact adherence to, what he had already done.

From 1816 to 1821 there was nothing done in furtherance and confirmation of this will, though to his friends he spoke in general terms in favour of improving education in Scotland, so as to show he had not given up all his ideas upon that subject; yet to none of them did he impart the detailed provisions of this will, or recognize the scheme which it contained, or the extent to which he meant to devote his fortune to that object; but he did acts inconsistent with its contents—he invested part of his property in the purchase of land, of East Mark and other property, notwithstanding he was aware that such property would not pass under his Indian will; for Mr. Drake fully apprized him that in 1818, and for three years he remained absolutely intestate as to that property, which would have gone to his heir at law in America, if she were capable of taking.

In 1821, he made alterations in the will by erasing at least some part,

and he executed another instrument by which he became testate as to his real estate, and deprived his education plan at least of that part of his property. This was a departure to that extent by a direct testamentary act: but that instrument he afterwards destroyed.

Now, what is the effect of this destruction, even taking it to have been a codicil? If by a codicil he had altered the will, the destruction of the codicil afterwards might be supposed to set up those parts of the will which were altered by such codicil; but the destruction of the codicil cannot have the legal effect of setting up those parts of the wills destroyed by erasure. How much of the will was erased and what were the exact testamentary intentions in October, 1821, cannot with positive certainty be ascertained: as far, however, as they can be inferred from paper A, all the annuities were revoked,—all the executors were revoked, and new executors appointed by the codicil. How then is it possible that the destruction of the codicil should again set up the whole of the Indian will as now propounded, even if there were proof that this will was not destroyed by the deceased himself?

But, without considering that legal consequence, what is the effect of the destruction of this codicil upon the main subject of inquiry, whether the deceased did or did not destroy the remainder of this partly erased and partly revoked will? He was again intestate as to his landed property; Messrs. Mortimer, who were to have it, and to perpetuate the name of Farquhar, were wholly cut off; his other relations in England were wholly excluded; he was without the new executors in England: whether he intended to die intestate or not, he at least was intestate in these respects from that time till his death.

It is not to my mind in any degree improbable, that at the time he took out the codicil and carried it in a moment of irritation to Broad Street to destroy it, in the presence of Mr. Colvin, he should at the same time have taken the will, altered and erased as it was, and thrown it into the fire: looking to the character and temper of the deceased, there is no improbability that both instruments coming under his notice together at that time, he should, under the same feelings that he carried the will of October to Broad Street to destroy it, have in the first place thrown the Indian will into his own fire; whether possibly with the intention, in that humour, of never making another and of dying intestate, or whether with the intention of revising and considering the whole of his testamentary disposition, need not be conjectured: the destruction of the will at that period was much more probable than that he should allow a will to remain, which could not operate on his landed estate; and should consent to remain intestate as to that property, depriving the Messrs. Mortimer to whom he had given it by the paper he now destroyed, and permitting the heir at law in America, alone of all his relations, to be benefited by his wealth.

Now, from that time till his death there was no one act of the deceased, and no part of his conduct tending to confirm and support the existence of this will: the probability of its existence depends wholly and entirely upon declarations, and declarations only.

Declarations alone, unsupported by circumstances strongly marking their sincerity, and confirming their probability, would of themselves be very unsafe and insufficient to repel the presumption of law. All declarations, where you are to rely on the exact words of a casual expression, are liable to be misapprehended—to be misrecollected—to be mis-

represented: a slight bias in the mind of the hearer will render the apprehension and the recollection incorrect: the slightest alteration of the expression, by a word, or almost a letter, may vary the whole import of the declarations: an alteration from "I have," to "I had" a will, would completely change the bearing of the words; the one signifying the existence of the will, the other its being no longer in existence: but, above all, the possible insincerity of declarations, particularly about wills, increases the danger of relying upon them. This has always been the doctrine not only of these Courts but of all other Courts. Sir William Wynne stated in Freeman and Gibbons, as I have already mentioned,—that recognitions of a will—even a few days before the testator's death—were no proof of the fact of its existence, because the declarations might be insincere. The doctrine is the same in all other Courts.

Thus, Lord Eldon, in the case of *Pemberton v. Pemberton*, to which I have before referred, expresses himself:—

"Few declarations deserve less credit than those of men as to what they have done by their wills. The wish to silence importunity, to elude questions from persons who take upon them to judge of their own claims, must be taken into consideration; with a fair regard to the *prima facie* import, and the possible intention connected with all other circumstances," 13 Ves. 301.

So, again, Lord Erskine (then become Lord Chancellor) in the same case. "After all this evidence the loose declarations of the testator, under circumstances imposing on him no obligation of veracity, are nothing," 12 Ves. 313.

And in *ex parte* Pye, 18 Ves. 148, Lord Eldon quotes Lord Thurlow's authority upon the subject.

"His Lordship, (Lord Thurlow) also made another observation of great weight, that having raised the presumption from the fact, you beat it down by declarations, which from the very nature of mankind, deserve very little credit, viz. what a man has done, or will do by his will; how much shall stand and how much shall not: declarations are intended generally to mislead: but the *prima facie* presumption is established beyond all controversy."

Applying, then, this doctrine to the present case: here the *prima facie* presumption, arising from the will being in the possession of the deceased, is, that he himself destroyed it; and declarations alone to beat that presumption down, unless connected with other strong circumstances leading to the same conclusion, would be very unsafe evidence. If, however, the declarations relied upon in support of the existence of the will be examined, they will all of them be found exposed to considerable suspicion of insincerity.

In the seventeenth article Mr. Colvin pleads, generally, declarations made after the deceased returned from France in the beginning of 1822. "That the deceased frequently declared to various persons that he had a will or two wills which he had made in India; that one remained in India, and the other in his own possession; that he kept the latter in the cabinet, and that David Colvin and Dr. Fleming were two of the executors." In subsequent articles Mr. Colvin pleads specific declarations to Mr. Drake in 1823, to Mr. Hume in 1825, and 1826, and to the Phillips' a few days before Mr. Farquhar's death.

It is to be recollected that various persons were anxious that the de-

ceased should make a will; and for different reasons: his partners wished there should be executors to settle the partnership accounts; Mr. Drake very properly thought it his duty to remind the deceased, that after-purchased estates would not pass under any will, but would go to the heir at law: the Phillips' had obtained a sort of memorandum or codicil, addressed to the executors of "any will made or to be made," to carry a certain agreement into effect; and consequently if there were no executors, there were no persons to whom this directory instrument could be addressed: they were not aware that a revocatory instrument had been executed by the deceased, as a precaution, on the 7th of January 1825.

Here were, therefore, different persons for different reasons urging the deceased to make a will, and he for different reasons would wish to evade, parry, and get rid of the subject: he might not, and probably did not, at least for a considerable portion of the time between 1822 and his death, mean to die intestate; but he might be in a state of intestacy, and clearly was in a state of intestacy as to his real estate—the great bulk of his property: for from 1822 to 1825, above 400,000*l.* was so invested: yet he did no testamentary act: he might not be able to make up his mind as to arranging the disposition of his great property, and he might, therefore, have evaded the subject, either by saying he had a will, or that the law would make a good will for him: and in point of character, it appears sufficiently from the evidence, that he was not so very scrupulous about veracity, as never to sacrifice truth in order to evade questions which he was not bound or was unwilling to answer.

After these observations it may be hardly necessary to travel very minutely through the various declarations: but, in a case so important on account of the great amount of property at issue, the Court is unwilling to pass over, without a full examination, any part of the evidence that has been relied upon.

Mr. Bazett, his partner, with whom he was intimate, and whom he met so frequently, yet says, that "deponent never conversed with the deceased on the contents of his will in any respect as regarded the disposition of his property: the deponent spoke to him about leaving a will of some sort, and as desirous that he should leave executors to settle his affairs with the deponent's house: the deceased told him not to be anxious;—'there is a will'—pointing to some place where it was deposited, —and he said, 'our friend David and a Dr. Fleming are executors.' To particular times the witness cannot depose, excepting it was at the deceased's house in the New Road, where he lived from 1823."

Here there was a manifest object, detracting much from the sincerity of the declaration. Besides, if paper 'A.' contained a correct representation of what remained in the Indian will, the appointment of Dr. Fleming, as executor, was reyoaked; and that of David Colvin also, by the codicil which the deceased had destroyed.

Mr. Bazett says, on a further article, "that he did not know during the deceased's life-time that he had a will in India: the deceased did not mention that; but he told the deponent that he had a will, and this more than once after he had gone into his house in the New Road. His reason for naming the subject of his will to the deceased was, from an anxiety that he should have executors, and he had some misgivings in his mind, from what he had heard Mr. Colvin say about it, that there might be a question as to whether the validity of the will, received from

India, was affected by any alterations he might have made in it: and further, deponent knowing the great changes his property had undergone, was desirous he should make a will adapted to meet such changes:—but the reason deponent put forward to the deceased was the promise which the deceased had given him, that he would leave a will appointing executors.” At least, then, Mr. Bazett’s impression was, at this time, an impression derived partly from conversations with his partner, Colvin, that, at the periods of which he has deposed, the deceased had no existing will containing an appointment of executors.

Hence, it is clear, the will in India was never mentioned: the deceased had either forgotten that he had any duplicate made, or he supposed the whole was sent over in 1816. Mr. Colvin also was equally ignorant respecting the will in India; he had his misgivings, that the will in the deceased’s possession was so altered as to be inoperative; and well he might; for, according to Mr. Colvin’s own paper A, the executors in the Indian will had been revoked. It is obvious that these persons were urging the deceased to make a will, and that, when he said, “there is a will, and there are executors appointed,” he was evading their attacks; for in 1823 or 1824, his talking of having a will, when between 400,000*l.* and 500,000*l.* were vested in real property, could hardly by possibility be sincere, as in allusion to his Indian will.

The next witness is Mr. Drake, and to him the same observations apply: he states:—

“On the 6th of February 1823, (deponent has referred to his books) he saw the deceased at his house, not in the New Road: he found him in a room at the very top of the house where he usually sat.” This interview then, was, I think, in his house in Gloucester Place, where the deceased sat in a room at the top of his house. “After their business was over, and just as deponent was coming away, he told the deceased there was one subject on which he wished to speak to him: viz. ‘that having often troubled him on the subject of his will, he had determined not to mention it again, but that the purchase of Fonthill made so great a change in the nature of his property, that deponent felt it his duty again to remind him that freehold property would not pass by a will made previous to the purchase.’ The deceased said, ‘Mr. Drake, I have a will in a drawer in one of these cabinets,’—holding out his arm to a range of cabinets; ‘Dr. Fleming and David Colvin are executors.’ The deponent told him, ‘that what he wished him to bear in mind was, that such will would not avail for the real property subsequently purchased, and which would, therefore, go to his heir at law.’ The deceased said, ‘he intended to sell it again:’ deponent suggested, that ‘in the event of death it would be proper to have a will which would pass that estate.’ Deceased replied, ‘he would think of it, or attend to it another time;’ and deponent left him.”

Such is the mode by which the deceased attempted to evade the subject: his saying “that he had executors,” was no answer to Mr. Drake, though it was to his own partner; and when Mr. Drake pressed him further, he said “he would think of it;” he did not produce any will: he did not enter into the subject, or into any particulars, relating to that will, with his confidential solicitor; but he parried him at last by saying, “he would think of it.”

The next witness is Mr. Joseph Hume; and the declarations to that gentleman are still more exposed to the suspicion of insincerity. The

parties had a slight acquaintance in India: in February 1825 they met accidentally at Mr. Fairlie's funeral; Mr. Hume began the subject, by telling the deceased, "that he intended to call on him respecting a plan for rebuilding the Marischal college at Aberdeen, that it was to cost 22,000*l.*—one-third of which it was proposed to raise by subscription." Mr. Hume developed his plan to the deceased, and states, "that he solicited his assistance." Here was a subscription solicited—the deceased approved his plans; but said, "he had other improvements in view by his will, and if he would call upon him he would show him his provisions." Mr. Hume had begun by saying, he intended to call upon him. Mr. Hume did call; carried his plans, and proposed that the deceased should rebuild the college at his own expense, without applying to government for assistance. A discussion then ensued on the various points: the deceased said, "there was one objection; there was one part of the statutes which provided for the performance of particular religious duties;" and, after discussing the various points at considerable length, the conversation was interrupted by some person coming in, and the interview ended. It ended therefore without obtaining a subscription, or a sight of the will.

Now a considerable suspicion arises that the deceased was insincere in the whole of these declarations; that he only asserted the existence of the will, and talked of the improvement of the professorships in order to evade the subscription and the re-building of the Marischal college. Here were the fact and the deceased's conduct;—the will was not produced.

Mr. Hume paid him a visit for another purpose—to solicit a subscription for the London University,—the deceased being supposed, and professing himself, to be a great friend to education in general. Mr. Hume now proposed various offers,—that the deceased should take a hundred shares—that a professorship should be established which would perpetuate his name: the difficulty, which had occurred respecting Aberdeen, of "the statutes requiring a particular form of religious worship" was here removed, by stating that "the absence of religious tests" was a part of the plan. The only obstacle, the witness says, suggested by the deceased was, "that it might interfere with the objects he had in view to promote at Aberdeen:" and though Mr. Hume was afterwards supported by two other gentlemen, as a deputation, from the London University, the deceased fenced and parried and defeated all three; for instead of one hundred shares he finally decided to take four; that is four per cent. Here then is strong reason to suspect that the objects at Aberdeen were only hinted at (for there was no reference to the will upon this occasion,) as an excuse for avoiding a larger subscription to the London University.

Ann Rogers, the maid servant, proves at once how little the sincerity of the deceased was to be relied upon: for she deposes to the deceased having told her that he had provided for her: "The deceased never told deponent he had a will; though he told her at Fonthill he had left her enough to keep her: she had heard him say that he had a will; when quarrelling with his nephew Mr. George Mortimer, the deceased told him very significantly he had a will: on some occasion or other she heard him speak of three wills, and say he had three."

Either then the deceased had no regard to truth, or the witness was mistaken; for there is no suggestion, nor probability of any other than

the Indian will and the will of October 1821; nor consequently of any provision for this witness.

Mr. Robert Hume merely deposes to the deceased having told him what had passed between him and Phillips: "the deceased was speaking in reprobation of the conduct of Harry Phillips, and he more particularly mentioned Mr. Phillips having had the impertinence to interfere on the subject of the disposal of his property by will; but that he did not want his assistance—he had two wills: whether the deceased said he had two wills at the time he was speaking, or that he had two wills at the time Mr. Phillips was speaking to him, the deponent is not sure, but he believes the former; for he thinks the deceased said 'I have two wills'—this passed either in the spring of 1825, or of 1826."

This witness, with a very proper caution, does not attempt either to fix the precise words, or the time: his difficulty and hesitation show with how much reserve exact words are to be relied upon, and how uncertainly time is fixed by mere memory unaccompanied by some circumstance enabling a witness to mark it.

The only remaining declarations are those to the Phillips': without entering into any consideration of the degree of credit to which those witnesses are entitled, but—assuming that the declarations are correctly related—to what do they amount? It is clear that they were not confidentially made. The meeting, to which Harry Phillips deposes, was not of that character; for it appears, that the deceased went to him for the purpose of endeavouring to make some arrangement about his suit in Chancery. He thus states: "They talked over the bill in Chancery; the deceased said, 'we will have no more lawyers, you and I can settle every thing.' They talked over the Fonthill property, the estate purchased of Mr. Bennett, the East Mark estate, and the situation of his property generally. . . . While talking over his affairs, the deponent again mentioned the subject of his will, telling him, as he had often done before, 'that if he did not make a will the estates would go to his heir at law:'—He said, 'he had no heir at law:' the deponent told him, 'he certainly must have one, and represented to him what a pity it would be to let his property get into the hands of the lawyers.' The deceased said, 'why, I have two wills,—I have told you so a hundred times.' He, deponent, said no more about it: and they talked about various other matters till they parted."

The sincerity of the deceased during any part of this conversation is, I think, extremely questionable.

In respect to what Miss Jane Phillips says about two wills, one in England—the other in India; as she is the only witness that supports the allegation in that particular, or ever heard the deceased mention that he had a will remaining in India, she must, I think, as I have already remarked, have misapprehended what passed.

If the case rested here, the evidence of these declarations would in my opinion be insufficient to repel the presumption of law, that the deceased himself had destroyed the Indian will; for there is nothing in his conduct to render it improbable. After his inquiries in 1816, he took no steps to give it effect; after 1822, he was repeatedly pressed to make a will and the necessity of it was pointed out to him: but he did nothing of a testamentary kind—he evaded the questions and advice by saying, "I have made two wills"—"I have a will there"—pointing to the cabinet—"in which Dr. Fleming and Mr. Colvin are executors;" a will,

which even if existing at that time would not answer the purpose, and of this he was well aware: so that his conduct and these evasive answers are quite consistent with his having destroyed this will, and with his being aware that he was in a state of intestacy, and even with an intention either from spleen or from indolence of dying intestate.

But if the Court is to look to the facts and circumstances of a tendency not consistent with the existence of this Indian will, how does the case stand? It is true that a presumption of law does not require to be supported by evidence; but when the evidence offered to repel the presumption is itself met and rebutted by stronger evidence inclining to support the presumption, the conclusion of fact becomes more decisive and satisfactory.

In this case the legal presumption is confirmed: first, by the general probability already adverted to: secondly, by Mr. Farquhar's conduct in respect to his property: thirdly, by his conduct in respect to his relations, particularly towards Mr. George Mortimer: and lastly, by declarations in strict unison with, and supported by, these previous circumstances.

It is unnecessary again to go over the general ground of probability that a person situated as the deceased was in India, forming these sort of notions about applying his great acquisitions to some scheme of general utility in his native country, and who, even in India by his correspondence with Mr. Wilson, showed he was not wanting in the feelings of nature towards relations, should upon his return—associating with his family and their rising offspring—satisfied with the attentions and conduct of several of them—mixing in the general society of this country—engaging in the other great concerns of life and in the employment of his capital—at length find out that devoting his whole fortune to such an undertaking, and in exclusion of his near and dear connexions, was a plan to be much altered and mitigated if not entirely laid aside; and should, at an advanced period of life and after inquiries upon the subject, discover, that his scheme would require much modification, and therefore, though he might sometimes talk of it, should never set about it.

But how greatly is the probability of his departure from the Indian will increased, when his conduct in respect to his property alone is considered; he was aware of the statutes of mortmain, he was aware that landed property purchased after the making of a will would not pass under it; yet he bought real estates, he bought East Mark and other property; and in 1821, conscious that these estates would not pass under his Indian will, he disposed of them by a testamentary instrument, he afterwards destroyed that instrument; not from disaffection to the devisee of the East Mark estate, but in resentment against Colvin, knowing that his real estate would devolve upon his supposed heir at law, whom he had never seen, and, at that time, described as "a vagabond in America." He afterwards purchased estates to an immense amount: for Fonthill he gave 300,000*l.*; for Mr. Benett's property 100,000*l.*: he took assignments of mortgages—lent 100,000*l.* on mortgage—that sum was paid off, but he offered to leave it at the same interest, and again lent 20,000*l.* on mortgage; he well knew that none of this would pass under his Indian will: he was an extremely acute, clever man, though fanciful, capricious, irritable, and passionate: yet, aware that this Indian will could not operate, and urged and pressed to make a will, no new

will was made—no testamentary act was done. Such was his conduct in respect to his property: true, he might not wish his heir at law to have it, but he seems latterly to have considered its value only as it contributed to his amusement in the management of it—in buying, selling, and speculating—reckless of what became of it afterwards. His conduct then in respect to his property would lead to a high probability that he had abandoned his Indian will, and would either make a new will or die intestate.

If this is followed up by considering his behaviour to his relations after his return to England, the probability of his destroying the Indian will is still further increased. Lady De La Pole, an orphan niece, whom he had educated, brought up, and in some degree provided for by this will, received him in her house at his arrival: he stayed with her and her husband a whole year; was godfather to one of her children; and continued his intercourse with her. Lady De La Pole and her family left London in 1819, and retired into Devonshire: and Miller on the sixteenth article says, “that when the family were about leaving London, the deceased took leave of Lady De La Pole most kindly; he was quite affected at parting. The deponent knows that the deceased and Lady De La Pole corresponded by letter.” In 1823, Sir William De La Pole proposed to pay a visit at Fonthill; and Mr. Farquhar wrote an easy and civil answer in return, that he should be happy to see him. He talked also of visiting them in Devonshire: for Mr. Alderman Wood says, “The deceased, shortly before his death, told the deponent of his intention to go into Devonshire to see Lady De La Pole, a promise long made, as he said, and which he should certainly perform.” Is it possible, then, that he could mean to exclude this niece entirely? for even the pittance given her in the Indian will was taken away in 1821.

Mr. Fraser, whom he had also educated, the only son of a deceased sister, though he had irritated his uncle in 1817, not by immoral conduct, nor by inattention to his professional pursuits, but by an independence of mind, not dishonourable to him, though offensive to the deceased, and such as induced the deceased to withdraw his allowance; yet Mr. Fraser was afterwards treated with kindness by his uncle; was received at his house; was met by him in society without any appearance of distance and resentment; he visited at Fonthill for several days together, and was an hour with him at his house in town on the very day before his death;—it is not probable that the deceased would allow a will to stand that would cut off even Mr. Fraser without a farthing out of his great property.

But the deceased's conduct towards the Mortimers, particularly towards Mr. George Mortimer, is irreconcilable with the supposition of the existence and intended operation of the Indian will: he not only devised the East Mark estate to him in October 1821, but his whole conduct to him from that time to his death, was that of increasing confidence and kindness: he and his family were inmates in the deceased's houses; the care and management of the Fonthill estate were intrusted to him; the deceased assisted him in his manufactory with an almost unlimited credit; he made large advances of money to him, and engaged him in erecting a manufactory on the Fonthill property; and yet, if this will was intended to be adhered to, not only would the real estate devolve under the mortmain acts, even East Mark and all,—not only would Mr. George Mortimer be excluded from the personalty by this

will, (for whether any of the mortgages would devolve upon the next of kin could hardly be in the deceased's contemplation,) but Mr. George Mortimer would be a debtor to the estate for all the monies advanced to him. The adherence, on the part of the deceased, to a testamentary disposition producing these effects is not more improbable than it would be unjust, and is utterly at variance with the treatment this particular relation experienced from the deceased in all the latter years of his life.

With these foundations of probability—built on the treatment of his property and of his relations—that the deceased should have destroyed the old will, how stand his declarations? Declarations, coupled with conduct and with acts, and consistent with them, are of weight in proof of intention: declarations also, not depending upon the precise words of a particular expression, but connected with extended conversation, and more especially if not liable to much suspicion of insincerity, have greater effect; but even still more, when made not upon a single occasion, but repeatedly in the course and current of confidential communications: such declarations are entitled to full attention.

Here is the declaration in 1822 to Mr. Hart Davis, naturally connected with what was the subject of conversation—not easily liable to any misapprehension, nor exposed to the suspicion of being insincere: "In the course of conversation, the deceased talked to deponent about his property, and told him of the investment he had made in the house of Whitbread and Co. which, he said, 'had paid him well.' And, having gone into several particulars respecting his affairs;" which showed the deceased was in a communicative mood; "the deponent observed to him, 'that it was very extraordinary the world generally supposed that he had made no will, and that with his immense property it could not be so.' The deceased replied, 'that he had made wills,' or 'had had wills.' The deponent said, 'it did not matter what he had had, but what he then had.' " So that there could be no doubt as to the substance of this conversation. The deceased replied, "Oh! the law will make the best will, or a very good will for me." And as this conversation passed after the codicil of October, 1821, was destroyed, and before the purchase of the Fonthill estate, the great bulk of his real property, if the Indian will were destroyed, would at that time, have been distributed among his relations. "The deponent added; 'yes, but at a pretty considerable expense.' What then passed was to that effect."

Now whether this declaration was sincere or not as to "the law making the best will for him," he certainly was intestate as to his real property in 1822; there seems not much reason to question its sincerity as to his having at that time no will, and being in a state of total intestacy, even though he might intend to make a will if he could persuade himself to set about it: he does not deny the fact that he is without a will; but excuses it.

The declarations to Mr. Alderman Wood are still more distinct and decisive: they are, if believed, (and there is not the least ground to disbelieve them), quite direct to the very point at issue. "He first knew the deceased soon after his arrival: the deceased dined with him frequently: he was in some degree in his confidence: the deceased consulted him on the affairs of the brewery, and showed deponent the account of the profits."

"Early in 1825, the deceased spoke to deponent several times on the subject of his affairs: the general tenor of his conversation and decla-

rations was the same; in fact, he repeated what he said again and again: deponent certainly did not introduce the subject to him, he thinks it was in some way or other through Dr. Fleming having expressed great anxiety that the deceased should make a will:" so that Dr. Fleming was of opinion the deceased had no will. "The deceased said, 'it was not material that he should make a will, for his property would be divided among his relations, and that he wished it to go as the law would dispose of it; the law would make a very good will for him.' "The deceased spoke of his heir at law as his great nephew, who was living at Charleston. It is clear, therefore, that he had been making some inquiries for his heir at law.—"That he had never seen him, and knew nothing of him, and that he scarcely knew his brother from whom his heir at law sprung; that they had gone to different colleges, and had left home very early, one for America, and the other for India." And this history is confirmed by the letters to Mr. George Wilson. "In speaking of his testamentary intentions, he told the deponent that it had been at one time his intention to establish a sort of Unitarian College, but that he had found some difficulties in the way, and had abandoned the idea:" which corresponds with what passed between the deceased and Mr. Joseph Hume, as to the particular forms of religion required by the Aberdeen statutes:—"that he had then made a will in India, bequeathing his property to the schools in Scotland, but that when he made that will he was entirely unacquainted with his family:"—and in his letter to Mr. Wilson, when he mentions that his friends disapproved of his education plan, the deceased says, 'he never had seen his family:'—"and that being a friend to education and not knowing his relations, he then thought it the best mode of disposing of his property: but that since he came to England and had become acquainted with his family, he had considered it right to destroy that will, and that he had destroyed it." Here is an express declaration of the fact:—"but he did not enter into any particulars as to the circumstances, or the time when he did so; the deceased however distinctly said, that he had destroyed that will, and that he had then no will."(a)

He says further:—"the deponent spoke to the deceased very freely, urging him in consideration of the peculiar circumstances of his property, its magnitude, and nature, and the difficulties that might arise out of it, and his declared intention of favouring his relations, that he should make a will, and after some hesitation, he said, 'I believe you are right,' and added, 'that he would make one.' Conversations to the effect now deposed of were repeated, and after the deceased had once said 'that he would make a will,' he never allowed the deponent to leave him without an assurance that he would do so."

Here then are declarations deposed to by a witness of unimpeached credit, not depending upon the precise words of a single declaration, nor on any transient impression; but the general tenor of the deceased's

(a) At this part of Mr. Alderman Wood's evidence are the following passages: in the last sentence is the declaration referred to *supra*, p. 134.

"In speaking on the subject of education, and of the will he had made in India, Mr. Farquhar said, 'that it was not the kind of will which he should then make, or allow to stand, even if he had not destroyed it for other reasons, because it was inapplicable to the then state of his property.' The deponent believes that the deceased spoke of having made more than one copy of that will, and that he had left one in India, as it was customary for persons to do when coming to England."

conversation repeated again and again, 'that his property would go among his relations, and he wished it to go as the law would dispose of it.' In this respect, he might possibly speak with insincerity, and be merely excusing his own indolence or indecision as to the disposal of his property: but in relating past conduct, there is less reason to suspect his truth and sincerity, because established facts concur with the declarations, and corroborate a great part of what he discloses: when, however, he said, that "he had made a will, and being a friend to education, and then entirely unacquainted with his family, he at that time thought it the best mode of disposing of his property, but that since he had come to England and had become acquainted with his family, he had considered it right to destroy that will, and had destroyed it:" this was a declaration clear, distinct, and direct to the very point at issue, and quite consistent with the whole of his conduct, with the *res gesta*, and with all rational probability.

Upon the whole view, then, of this important case, and after all the consideration to which it is entitled, my opinion is clear and without any doubt resting in my mind. Here was a will executed in India, in 1814, just before the deceased finally left that country without any intention of returning there—it was executed in duplicate; one part remained there till after the testator's death, the other part is admitted to have been in the deceased's own custody and possession in England; it was never seen after the year 1822; on the deceased's death in 1826, a careful search was made and no will found: the presumptions of law are—first; that the duplicate in his own possession was destroyed by the deceased himself—secondly; that, by destroying the duplicate, he intended the revocation of the other duplicate not in his own possession: to negative these presumptions, the burthen of proof lies upon the executors setting up the duplicate: the evidence, adduced for that purpose, appears to my judgment quite insufficient to repel the legal presumptions.

On the other hand, the legal presumptions are strongly supported by the probability of the fact, that the deceased himself would destroy and revoke this will, by his conduct in regard to his property, by his intercourse with, and treatment of, his family, and by his confidential declarations.

The Court must, therefore, pronounce against the will propounded, and that, so far as appears, the deceased is dead intestate.

In respect to costs, I think that I cannot upon principle decree them to be paid out of the estate. The administration had gone out, and was in part acted upon,—even by Mr. Colvin himself. When an administration is so called in, an executor proceeds at his peril,—certainly at his own risk: here are many facts pleaded which are not precisely proved—here are charges insinuated of a very serious colour, which are not supported by facts—here are great expenses occasioned, and great suspense and anxiety at all events excited in the relations: it would be contrary to principle to allow, under such circumstances, the executor's costs out of the estate. If the executor had made fair inquiry, he must have been satisfied that this will had been destroyed by the deceased himself—indeed, according to the evidence, such were his own impression and belief. Being satisfied of that fact, he could not have been misled as to the law,—that the duplicate in India was revoked. He was, then, under no obligation to bring the case before the Court.

With regard to the parties cited to see proceedings they need not have appeared at all; and it would be a dangerous precedent if, when an

executor—the person intrusted by the testator to see his will executed—is before the Court, legatees are to interpose and have their costs out of the estate.

I must, therefore, leave these several parties to the consideration of the next of kin. The Court, having no right to indulge its liberality in disposing of their property, because it happens to be of great amount, would not be justified in decreeing that the costs should be made a charge upon the estate, unless the sound principles of public justice require it. In the present case the Court makes no order respecting costs.

CONSISTORY COURT.

GOODALL and GRAY v. WHITMORE and FENN.—p. 369.

In a suit for subtraction of church-rate, the Court will not, at the prayer of the defendants, issue a monition for the production of parish books, which are not shown to apply immediately to the question at issue: and on the merits, the rate being pronounced for, the defendants condemned in costs.

In questions of subtraction of church-rate, the Court having jurisdiction on the subject-matter is bound, unless stopped by a prohibition, to proceed to the trial of a select vestry by which the rate was made.

Costs, though in the discretion of the Court, are in its legal discretion guided by former precedents, and are almost universally decreed in suits for church-rates, where the rate is pronounced to be subtracted.

HARRIS v. HARRIS.—p. 376. 3d/53.

192-y.s.c.

76/8. The wife having failed in a charge of adultery, and a recriminatory plea on the husband's part being proved; cruelty, and the introduction of his wife to a female of loose character (the wife's guilt not being connected with such introduction), form no bar to his prayer for divorce.

Where the wife is charged with adultery, her conduct and declarations, on a confession of guilt by the alleged *particeps criminis* being communicated to her, are admissible evidence on behalf of the husband.

176. Cruelty cannot be pleaded by the wife in bar of a charge of adultery.

THIS suit commenced by a citation on the part of the wife, who charged the husband with adultery: the libel, consisting of twelve articles and an exhibit, having been debated and admitted; an allegation of twenty-six articles, with six exhibits annexed, was admitted on behalf of the husband. This allegation contradicted and denied the principal averments of the libel, accused the wife of adultery, and concluded with a prayer for a divorce. A responsive allegation was then admitted, which, among other things, pleaded "that Captain Harris soon after his marriage neglected and exposed his wife to improper and unbecoming situations, and to the influence of pernicious society; and that, regardless of her honor and character, he caused her to visit and associate with persons of a character and description altogether improper for her society, and by various means promoted an intimacy between them." In a further allegation, admitted on the part of Captain Harris, these averments were expressly denied.

These several allegations were admitted without opposition; and, on the evidence taken upon them and upon the libel, the cause came on for hearing.

Phillimore and *Addams* for the wife.

The King's Advocate and Dodson, contra.

JUDGMENT.

DR. LUSHINGTON.

This is a suit for a divorce by reason of adultery. The parties in the cause are Anna Maria Harris, and Captain George Harris of the Royal Navy; they were married on the 29th November, 1821, and the issue of this marriage has been two children, both of whom are now living. After the marriage the parties cohabited at different places, and particularly at a cottage situated on Fulmer Heath, in Middlesex.

In the spring of the year 1823, Captain Harris was appointed to the command of the Hussar frigate, and in January, 1824, proceeded to the West Indies: he remained on that station until the month of July, 1826, when the Hussar was ordered home, and arrived at Portsmouth on the 19th of October in the same year. The cohabitation between these parties was then renewed, and continued at various places, particularly at a house taken by Captain Harris at Brompton, until the month of February, 1827, when Captain Harris deemed it necessary to abstain from cohabitation with his wife; who, on the 20th of March following, quitted the house of her husband and proceeded to join her parents in France, under circumstances to which I shall hereafter more particularly advert.

In June, 1827, Mrs. Harris instituted a suit for a separation by reason of her husband's adultery, as alleged in the libel given in on her behalf. In February, 1828, an allegation on the part of Captain Harris, was admitted, in which he denied the charge of adultery imputed to him in the libel, recriminated on his wife, and in conclusion prayed a separation. Mrs. Harris, in another allegation, then accused her husband with culpable inattention towards her, and that he had been wanting in a just regard to the preservation of her purity and of his own honour. And by means of interrogatory, but not by averment in plea, she has imputed to her husband unjustifiable severity.

It appears, therefore, that there are several distinct questions in the cause, and the Court will proceed to consider those questions nearly in the order in which they arise, and have already been stated.

The first question is, as to the adultery alleged against Captain Harris, and the substance of the proof adduced in support of it. The first charge of adultery against Captain Harris, is in relation to a Mrs. Waverly, in 1824, when he was in command of the Hussar frigate, and stationed in the neighbourhood of Vera Cruz. The libel, indeed, contains a general charge; "that Captain Harris whilst in command of the Hussar in the West Indies, and on the coast of America, when on shore at different places, formed an adulterous intercourse with divers strange women:" but the evidence, I think, is confined to the single charge of adultery with this person of the name of Waverly, or who seems to have passed by that name; for it is not very clear whether it was her real or only an assumed name.

It is established, in evidence, that this Mrs. Waverly was received on board the frigate some time in 1824; and, that she did prove to be a woman of bad character, is quite clear from the testimony of the Surgeon, Mr. Galloway: it is equally clear, that if Captain Harris and this woman were so disposed, they must have had full and convenient opportunities, whilst this person was on board the Hussar, to have committed adultery. From the disposition of the cabins, or, indeed, from

any disposition of the cabins that could have been made, no one can doubt that there must have been ample facilities for the commission of such an offence. But then, before the Court can affix guilt on Captain Harris, it must be satisfied that there was something more than opportunity. There must be some overt acts, or some circumstances to show that he was disposed to avail himself of the opportunity to commit adultery, and that he actually did so.

Now, if there was the slightest proof of any indecent familiarity between the parties, or if the Court was in any way satisfied that undue intimacy subsisted between them, then the Court would travel much more easily to the conclusion, that where the facilities were so great, and the opportunity of access so easy, the crime of adultery might have been committed; there is not the least proof, however, of any indecent familiarity, nor improper intimacy between the parties, nor of any conduct approaching towards it, and I cannot come to the conclusion that they did commit the crime of adultery without disbelieving the evidence of Galloway, the Surgeon, and Wilcocks, the Clerk on board the Frigate, who were examined to support the charge, but both of whom declare their disbelief in it; and Wilcocks, in particular, states it to be his strong and firm conviction, that no improper intercourse was carried on between Captain Harris and this Mrs. Waverly whilst she was on board the Hussar. It further appears, that this person was only on board the Hussar for a few days, and that she came with Mr. Hall, a merchant, who was in the ship at the same time, and who afterwards died there. Her passage to England, it would seem, was taken in a merchant vessel lying in the Roads, and which was waiting for dispatches; and when that vessel was ready, Mrs. Waverly quitted the Hussar. This is nearly the whole of the evidence in relation to the charge of adultery between Captain Harris and Mrs. Waverly, and the Court has no difficulty in coming to the conclusion, that there has been a failure of proof as to this first charge.

The next charge has been truly represented as the most serious in the case, at least so far as regards Captain Harris. That charge is, that, for a long series of time, Captain Harris carried on a criminal intercourse with the wife of a gallant officer, who commanded the Royal Engineers stationed at Barbadoes and the adjacent islands, when Captain Harris was stationed with the Hussar in the West Indies. It appears that Captain Harris became acquainted with this officer at Barbadoes, on some occasion when the Hussar touched at that island, in the spring of the year 1825. The exact period when this acquaintance commenced is not, I think, very clearly stated; but in May, 1826, this officer became desirous of making, what the witnesses call, a tour of inspection to the Leeward Islands, in the fulfilment of his military duties, embarked on board the Hussar, and was then accompanied by his wife. After visiting several of the Leeward Islands, they returned to Barbadoes, in July, 1826; and the Hussar shortly after being about to proceed to Jamaica, and thence to England, Captain Harris offered the wife of this officer a passage on board his ship.

It is established in evidence, that at this time the lady of this officer was suffering under ill health. As to what may have been the precise extent to which she was affected by illness, is not by any means material: it is a point on which opinions might very naturally differ, and it is of no further importance in this proceeding, than as it shows that this

offer of a passage to England arose from that cause, and that her ill health was not stated as a pretence merely. I think it appears from the evidence of Galloway, the Surgeon, that she was at this time suffering under dyspepsia and other complaints; and that, upon a consultation taking place, she was recommended by her medical advisers to try the effect of a visit to England: and under these circumstances Captain Harris offered her a passage on board his vessel to England.

So far, the Court is of opinion that there was no imputation on any of the parties. There was no impropriety in such an offer having been made, nor in such an offer being accepted. There was no reason, as it appears to me, why the wife of a British officer should not accept of a passage on board a British man-of-war, and prefer the superior accommodation of a king's ship; and there was the less reason when she was an invalid, and when the commander of that ship was a married man, and the friend of her husband. The most innocent and useful intercourse which takes place in society would be destroyed, and great and unnecessary inconvenience would arise, if it was held that a circumstance of this description conveyed any thing in the nature of an imputation on the character of a party. The Court is of opinion that the honour and character of this lady were, and ought to be, considered as safe at least in a vessel of war as in a private ship; and that she would there be protected, at least as effectually, as if she had taken her passage home in a packet, or any other description of vessel.

It is true, however, that though this acceptance of her passage to England in Captain Harris' frigate, may have originated in perfect innocence, yet, the intercourse thus produced may have acquired an illicit and criminal character in its progress; and it therefore becomes the duty of the Court to scrutinize the facts and circumstances given in evidence, and to see whether evil might not have subsequently been engrafted on what was in itself innocent, and whether the consequences were such as have been suggested.

When the Hussar arrived at Jamaica, her course was varied, and it was ordered that she should proceed to Vera Cruz, and thence to England, so that the voyage was necessarily prolonged. Now, this was a misfortune in no degree attributable to either of the parties whose conduct the Court is now considering, and the circumstance did not, in my opinion, impose any obligation on the lady to quit the Hussar. She was not called upon, because the voyage was altered and somewhat prolonged, to undergo the inconvenience of a change to another vessel, and to waive the advantage of the superior accommodation of a king's ship. Even if she had evinced no desire, and if no attempt had been made to procure a passage for her on board another vessel, I do not think there would have been any imputation resting on her upon that account: but it is in evidence that she was much disappointed upon being informed that the Hussar was to proceed to Vera Cruz, and that her arrival in England would be postponed; that she was most anxious to avail herself of another opportunity of returning to this country, and that exertions were made to procure a passage for her in another vessel, but without success. Nothing whatever, therefore, prejudicial to the character of this lady can be inferred from the circumstance of her remaining on board the Hussar after the arrival of the ship at Jamaica, and the alteration which was directed to be made in the voyage to England.

What, then, are the circumstances, during the voyage home, that are to lead the Court to the conclusion that adultery was committed by these parties when on board the frigate? The counsel for Mrs. Harris argued the case as if they thought that, unless what occurred on board the vessel should take its complexion from subsequent circumstances, the Court could not conclude that adultery was committed on board the vessel; but that subsequent circumstances gave such a complexion to those which had taken place on board the vessel, that the Court must conclude that the adultery did occur there.

In support of this view of the case, it has been said, that there was great facility of access, and I think it is so proved; but then this facility of access was not purposely made; it is incidental to the state of a ship; and it is quite evident that, on board a vessel, difficulty of access, even when desired, can seldom be effected. If it appeared, however, that any undue familiarity was observed between the parties, or that any improper attentions were paid by Captain Harris to this lady, during the voyage to England, the Court would then find less difficulty in coming to the conclusion, that, where access was so easy, the parties had availed themselves of the opportunities thus afforded. Upon looking to the evidence, however, the Court sees no one fact or circumstance which could justify it in drawing such a conclusion. The behaviour of the parties in public appears to have been perfectly proper, and quite unexceptionable; for no circumstance is stated tending to throw the slightest suspicion on any part of their conduct during the voyage. It is impossible that, because it is in evidence that this lady was a pretty woman, or a vain woman, the Court should suppose that she was criminal, or that it should impute to Captain Harris, without further evidence, the crime that has been charged against him.

It appears that a female servant, of the name of O'Brien, and a little black girl, were in the service of this lady, and accompanied her to England; and that for some time after the ship left Barbadoes, they used to sleep at her cabin door. However, from the statement of the witnesses who have deposed to the fact, it seems that O'Brien and the black girl did not always sleep at their mistress' door; that their births were removed for the purpose of accommodating the Mexican Minister and his suite, who were on board. Any inference, therefore, which could be drawn from the circumstance of the servants changing their births is explained away, the fact being thus satisfactorily accounted for: and there is no other occurrence during the voyage to which it is necessary the Court should advert.

The Court is therefore of opinion, that there is no foundation for any suspicion that a criminal intercourse took place between this lady and Captain Harris on board the Hussar; and it has great satisfaction in arriving at this conclusion; for if otherwise, the Court would have deeply lamented that so distinguished an officer as Captain Harris, whilst on board his own vessel, should have so much forgotten what he owed to himself, as well as the sacred duty imposed upon him of protecting the honour of his friend's wife. A lady so committing herself, and being so committed by her husband, as this lady was, to the care of Captain Harris, stood towards him in a relation nearly as close as a ward to a guardian; and any breach of this sacred trust, or any violation of confidence on his part, would deserve to be reprobated with more than ordinary severity. The Court has great satisfaction, therefore, in relieving Cap-

tain Harris from the imputation on his honour which was conveyed by this part of the charge.

The Hussar arrived at Portsmouth on the 13th of October, 1826, and nothing occurred at Portsmouth which could lead the Court to the conclusion that an improper intimacy was carried on between these parties. So far the Court is of opinion, that this charge of adultery is wholly unsupported. As to the circumstances alleged to have taken place at Portsmouth, and the attentions stated to have been paid by Captain Harris to this lady subsequent to her arrival in that port, and before he set out for London, the Court does not consider it necessary to enter upon them with any minuteness. As proof of a charge of adultery they amount to nothing, and the Court will therefore pass them over, and proceed to the next branch of the case.

This lady came to London from Portsmouth on or about the 17th October, 1826, and was lodged in a house situated in the Regent's Circus. At those lodgings she was visited by Captain Harris. The Court cannot but feel that the previously existing state of things was now changed, and that the subsequent intercourse between these parties must be examined by different rules and is subject to different considerations from those which were applicable when this lady was a passenger on board Captain Harris' ship. She had now arrived in England, and there was no longer any occasion for the protection or services of Captain Harris: she had a father and mother, who were living in or near London: and the intimacy which had necessarily subsisted previously between these parties was no longer called for by the situation in which they were now placed, or by the circumstances of the case. I think therefore that during the remainder of his intimacy with this lady, the Court is bound to consider that Captain Harris was divested of his former character, and to apply different principles to his conduct.

The intercourse between these parties must now be judged of by the ordinary rules and principles applied to the conduct of married persons on shore. That a considerable intimacy did continue to subsist, and to an extent which ought to awaken the vigilance of the Court, cannot, I think, be denied. It behoves the Court, then, scrupulously to consider, and to weigh all the facts, so as to ascertain, if possible, the true character of the intimacy between these parties; whether it was criminal or innocent; whether it was only carried on with heedlessness and a want of due caution, or whether it was carried on with any real intention of committing the crime of adultery. ££.3
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The fact principally relied on is, that Captain Harris slept one night at the before-mentioned lodgings whilst this lady occupied them. It is also in evidence that he slept on another occasion at a house in Sloane-street, to which this lady had removed; but the Court is at present confining itself to a consideration of what took place in the Regent's Circus. Much discussion has taken place as to the period when Captain Harris did sleep at these lodgings; but I think the only result which the Court can come to from the evidence is, that Captain Harris did sleep there on a night in the latter end of the month of October, 1826. Whether he had an opportunity of sleeping at Mrs. Cary's house in Berkley-street, on this occasion, does not very clearly appear; but the admitted circumstances are, that he slept on a sofa in the drawing room, and that this lady slept up stairs on another floor; that the night was wet, and that Captain Harris went away very early in the morning.

This is the amount of the evidence, and nothing further is proved in reference to that night. If the Court were to conclude that adultery was committed on this occasion, it must infer it from the circumstances that I have just stated, for there are no others connected with this part of the transaction distinctly proved.

It has been argued, however, that Captain Harris slept at the lodgings in the Regent's Circus on two separate occasions; and if that fact had been proved in the case, even though it should have come out incidentally in the course of the evidence, and had not been pleaded, the Court would undoubtedly have considered it a circumstance replete with suspicion, and would perhaps have judged it right to afford an opportunity of counter-pleading it, even after publication, so as to give Captain Harris an opportunity of explaining it, if he was so disposed, or if the circumstance appeared to him to be capable of explanation. But it appears to be the result of the evidence on this point, that there is no sufficient proof that Captain Harris slept at the lodgings in the Regent's Circus on any occasion but one.

The point arose on the evidence of Mrs. Pinker, a witness disposed to give her testimony with perfect fairness; but I think the Court cannot trust much to her memory, which appears to be exceeding loose as to facts. The circumstances to which she has been called upon to depose were not of such importance in her mind when they occurred, as to enable her afterwards to give a detailed account of them, with all the precision which might be desired. I have no doubt, however, I repeat, that this witness meant to depose with perfect fairness.

Before coming to a full determination, or rather a full expression of the opinion of the Court on the evidence as to what occurred at the lodgings in the Regent's Circus, I shall proceed to consider some subsequent circumstances which have been deposed to, as occurring after this lady removed to the lodgings in Sloane-street from the Regent's Circus.

On the 30th of November, 1826, this lady took possession of her lodgings in Sloane-street, and it appears that Captain Harris also slept there one night. The evidence is, that on the evening she entered her new lodgings, Captain Harris visited her; that he was engaged for some time in taking an inventory of the furniture; that the night was inclement, and that he remained there till morning. Now, I think it is admitted, that at this period Captain Harris had an opportunity of sleeping at Berkley-street if he had so chosen: that I think is in proof: and the Court undoubtedly cannot find for itself any strong reason why Captain Harris did not avail himself of that opportunity: it has great difficulty satisfactorily to account for the circumstance, or to explain why Captain Harris did not proceed on this night to Fulham, or to Berkley-street, to either of which the distance was not great. The mere fact of the night being bad, or the season being inclement, was not sufficient to have deterred an officer, like Captain Harris, from repairing to his home, if he had been so disposed. The fact, however, is distinctly proved that Captain Harris slept at these lodgings on this night; and if the evidence of Mary Ann Payne is entitled to credit, there is no doubt that the Court is bound to hold the adultery as proved to have been committed on that occasion.

But there are many circumstances why the Court should not rely on what has been deposed to by this witness. Her testimony is improbable, and even incredible in many parts, on the face of it. The

circumstances to which she deposes could not have occurred, even if the parties were ever so well disposed, in the manner she has stated. She has been contradicted also upon the most material facts by Anne O'Brien, and by the same witness and by Mrs. Aldridge upon other facts, and also by Miss Stewart. The contradictions are of such a nature that the Court cannot attribute the failure of truth, which appears in the testimony of Payne, to a mere accidental lapse of memory or to unintentional variation; but I must conclude that something remains behind, and that this witness was actuated by secret motives, which induced her to forge the tale. That there was something influencing her to state more than she knew or than she could truly state, is, I think, clearly established. The Court is obliged to make an election between her and the other witnesses; for it is impossible that the Court could give credit to the testimony of Mary Ann Payne and of the other witnesses also; between these alternatives therefore I must decide, and I think I am bound to discredit her testimony rather than that of the other witnesses.

It cannot be necessary for the Court to travel through all the circumstances adverted to by counsel, to prove in what instances the testimony of this witness varies from that of the other witnesses, or in how many instances she has shown herself to be undeserving of credit in this case, and to have deposed to what was not true: it is enough to say, that the Court gives her no credit at all. But though the Court gives no credit to the testimony of Mary Ann Payne, yet the fact remains that on the night of the 30th of November, Captain Harris slept in Sloane Street, in a room adjoining that occupied by this lady as a sleeping-room; and I think it is proved that he went to Berkeley Street early the next morning, in search of his dog.

There are one or two circumstances which the Court has considered with no small share of anxiety, as tending to throw a light on the conduct of these parties. And, first, it has looked with great attention to the evidence in support of the allegation, that these parties represented themselves as relations or cousins in either of the lodgings. If they had so represented themselves, I think it would be an important fact in the cause. Now the evidence is, that Mrs. O'Brien did so represent the parties: this fact we have from several witnesses; but there is no evidence in the cause to show that any such representation was ever made by either of the parties themselves, or that it was ever made at all with their knowledge or concurrence; and I think, in a question of extreme importance, it would be too much to presume that any such representation was made with their connivance, unless it was established by evidence nearly as clear as if the representation had come from the mouth of one or the other.

These, then, are the undisputed facts, and, I may say, the only facts 269.
on which the Court is called upon to conclude the adultery was com- 545:
mitted: I mean the facts which are in proof—that on two occasions
+ Captain Harris slept in the same house with this lady. There is not
+ any improper familiarity proved, upon credible testimony, to have passed
between them: there is no indelicacy, no one act demanding of the
Court to conclude that adultery had been committed, or that the parties
had availed themselves of those convenient opportunities from which
the Court might infer, that an adulterous intercourse was carried on be-
tween them.

447. Such being the state of the case, it is not unimportant to consider what would have been the natural conduct of this lady, if (as is suggested) she had fallen a victim to the seduction of Captain Harris. "It is reasonable, I apprehend, that in such an event she should have been desirous of availing herself of undisturbed opportunities," in which her guilty passion might be indulged. But does she do so? It appears to the Court that she did not; for, soon after she commenced her residence in Sloane Street, she took Miss Stewart, a young lady, who was seventeen years of age when examined, and who might have been about sixteen at the time I allude to, as her companion. Now the very circumstance of taking a person of this age and in this situation into the house, which was not an extensive house, but only a lodging-house, must of itself have thrown frequent difficulties and obstacles in the way of any illicit intercourse; and not only this, but it must also have afforded a great probability of detection. Captain Harris then is fully entitled to the benefit of this fact, and the impression of the Court is, that it is irreconcilable with actual guilt.

There are some other facts which tend to lead the mind of the Court to the same conclusion. Mrs. Harris, though well acquainted with this lady, clearly had no suspicion that she and her husband were actually carrying on an adulterous intercourse. Mrs. Cary, indeed, states that Mrs. Harris felt, or pretended to feel, some jealousy at the attentions which Captain Harris paid to the lady in question; but it is quite evident that Mrs. Harris herself kept up a constant acquaintance with her, and that she never thought, or never mentioned at least, that she suspected any impropriety between them. It appears further, that when Mrs. Harris was confined to her bedroom and was in trouble, and wanted a confidante and friend, after her husband expressed his determination of separating from her unless she could explain her conduct, she sent for this very lady, and required her interposition with Captain Harris. Now it is not at all likely—it is scarce possible, I think,—that if Mrs. Harris entertained an idea that her husband and this lady were criminally connected, that she would have chosen her to effect a reconciliation with Captain Harris. Another circumstance is, that this lady's husband returned to this country in March, 1827, and it is quite clear that no suspicion had entered into his mind as to the conduct of his wife with Captain Harris, for he continues on terms of confidence and intimacy with him.

The alleged adultery between Captain Harris and this lady then, I think, is unproved by any other circumstances, than the facts to which I have already adverted, of Captain Harris sleeping in the same house, and the consequent opportunity afforded to the parties if they were disposed to avail themselves of it.

The Court does think that the character of a British naval officer goes some way to explain these facts. Persons on board ship are less accustomed to attend to their personal comfort and convenience—much less than persons who reside on shore—and, perhaps, naval men are less attentive to minute points of decorum. The evidence is, that at the lodgings in the Regent's Circus, Captain Harris had thrown himself on the sofa with as great a disregard for personal convenience as might well be conceived. It is possible, too, I think, that the idea of impropriety, where there is no improper feeling, might not enter into his mind so readily, under such circumstances, as it would be supposed to do in the mind of a person accustomed to a different mode of life. Per-

sons who are accustomed to a sea life are used to the slightest accommodation, and the slightest separation in their sleeping-places; and as their feelings, on those matters, are somewhat different from persons living on shore, their conduct, in respect to them, should be judged of upon rather different principles. But, however innocent such conduct may have been, and innocent the Court believes it to have been, it cannot be deemed very prudent conduct on the part of Captain Harris. The Court, whilst it acquits him of the charge of criminality, cannot absolve him from the charge of indiscretion, by which he might have implicated the character of the wife of his friend, as well as have endangered his own honour and his rights as a husband.

Being of opinion, then, that Mrs. Harris has failed in her proof on the charge of adultery against her husband, the Court must now proceed to consider her own conduct and behaviour, and, in doing so, it is only necessary that it should refer to what occurred at Portsmouth when Mrs. Harris visited that place in the month of September, 1826. There is a great deal of general levity of conduct and very gross behaviour on the part of Mrs. Harris; into the particulars of which, it is not necessary that the Court should descend. The substantive charge is, that an act of adultery was committed by her with Captain Latouche, on the 13th of September, in Stanstead-wood, in the neighbourhood of Portsmouth. The most material witness in support of this charge is Mrs. Donald, and, supposing for a moment that the Court ought to give implicit credit to her testimony, I am bound to say, that the facts to which she deposes, as having occurred on this excursion to Stanstead-wood, afford full and complete proof of the adultery charged against Mrs. Harris.

After stating the names of the persons of whom this party was composed, Mrs. Donald deposes as follows, on the eighteenth article:—"After breakfasting at an inn, near the woods, the party set out thither. Mrs. Harris evidently wished to remain behind, and did so. She was uneasy at not having Captain Latouche all to herself, as he sometimes walked with Miss Mottley. As the party neared the wood, Mrs. Harris took deponent's arm, and still hung behind, and at length proposed to deponent that they should hide away from the rest of the party. Deponent at first objected to it; but Mrs. Harris said, 'she would not give a farthing for a party of that kind without some adventure in it;' and they then got over a bank into a private part of the wood, not open to the public, and out of sight from the rest of the party. While there, Mrs. Harris cried out 'whoop,' like a child at play, and sat herself down on the bank while deponent was gathering some nuts hard by. Mrs. Harris at length attracted Captain Latouche by her calling, and he got over the bank and sat down by her on it, deponent remaining behind. Deponent saw them both reclining on the bank, his arm round Mrs. Harris' waist, whispering together, and seeing it, she called to Mrs. Harris, saying, 'that she (deponent) was not going to stop there all day, and begged her to come away.' Mrs. Harris did not pay any attention to deponent, who proceeded over the bank again from the private wood towards the point where she had expected to meet the rest of the party."

Now, surely, if any belief is to be given to the testimony of this witness, the Court really knows not what further proof it would have to convince it that a fact of adultery did occur on this occasion. Here the parties were left together, at the very moment when they are seen in the fact of an indecent familiarity, reclining on a bank, his arm round

her waist, and whispering together. After they are thus left, they have ample opportunity of committing an act of adultery if they were so disposed. Mrs. Harris is called upon by the witness to come away; she refuses to do so; she does not come; and the Court can arrive at no other conclusion, but that the adultery had almost begun at the time that this witness quitted the scene.

But, it is said, that implicit credit ought not to be given to the evidence of Mrs. Donald, nor indeed to the evidence given by any of the parties, as to the manner in which Mrs. Harris conducted herself on this occasion. The Court is certainly of opinion, that as far as the observation applies to the testimony of Mrs. Mottley, Mrs. Matthews, and Mrs. Donald, it is bound not to receive their evidence without a nice examination. The Court does not consider the whole of the representations contained in the evidence of Mrs. Donald as positively proved; but yet the Court does not suppose that this witness came forward with an intention of giving a false colour to the transactions of which she deposes, still her evidence appears to have been given with a feeling disadvantageous to Mrs. Harris, and therefore if the case rested on her evidence alone, the Court might have had a difficulty in forming a satisfactory opinion. The Court does not think, however, that Mrs. Donald is at all contradicted by the other witnesses on any essential point: on the contrary, her evidence is confirmed by them all, on that fact which is perhaps the most material in the case, namely, the continued absence of Mrs. Harris and Captain Latouche from the rest of the company.

What, then, are the other facts of the case which lead the Court to the conclusion, that adultery was committed on this occasion, and which render it probable that the parties availed themselves of the opportunity thus afforded? In the first place, then, there was an avowed attachment on the part of Mrs. Harris, a married woman, to Captain Latouche, who was an unmarried man. This appears upon the evidence of several of the witnesses. There are other circumstances, too, which are not entirely to be left out of the case, as proving the disposition of Mrs. Harris to commit the crime of adultery. The letters which have been exhibited are of this nature.

Now if it had appeared, that before this transaction the mind of Mrs. Harris was pure, and her conduct unexceptionable, the Court would have much more difficulty in coming to a conclusion, that she had yielded at once to the temptation and given a licence to her passions. The improbability of her at once yielding to licentiousness, and forgetting what was due to common decency, as well as to her moral and religious obligations, would then be much greater. But when the Court read the letters exhibited in the case (I allude particularly to that one marked No. 5,) it was impossible they should leave any doubt upon my judgment, that a mind more depraved, a disposition more likely to be led into temptation, could scarcely exist in any person than must have existed in the writer of that letter. It will not be necessary for the Court to read any part of those exhibits now; but having read them, I am not prepared to say, that more depravity of mind, or principles more completely undermined, could be expected to be found in any situation of life, or any rank of society. The Court does not think that a person, who could have written the letter to which I have already referred, and given it to a young lady of fifteen or sixteen years of age to read, as Mrs. Harris is proved to have done, could have possessed any scruples

of decency or delicacy which would prevent her from indulging a criminal passion, whenever a convenient and practicable opportunity offered.

The Court is of opinion, therefore, that the disposition and mind of Mrs. Harris, as proved by those letters, tend greatly to corroborate the evidence of Mrs. Donald, and to render the conclusion come to upon her evidence, that Mrs. Harris did commit the offence charged against her, the more probable.

A declaration alleged to have been made by Mrs. Harris to Mrs. Mottley, some weeks after the excursion to Stanstead, has been observed upon as further proof that adultery was then committed. The declaration was not pleaded; nor is the Court inclined to ascribe to it much weight, certainly not all that weight which the Counsel for Captain Harris have in argument demanded for it. There is another part of the case however, which is of great importance, as satisfying the mind of the Court upon this part of the case; I refer to the evidence of Mr. Mottley on the twenty-second article of the husband's first allegation. (a)

(a) In the twenty-second article of Captain Harris' first allegation, it was pleaded:—
"That George Harris, having been in the early part of February 1827 at Portsmouth, and there for the first time informed of some part of the conduct of Anna Maria Harris, his wife, while she was at Portsmouth, prior to and after his return from sea, did, on his return home to Brompton Crescent, on the 13th of February, depute a friend to inform Anna Maria Harris, 'that such her misconduct had come to his knowledge, and that he would not again have any intercourse with or see her until she was able to clear up her character;' and that he from such time wholly ceased to live and cohabit with his wife: and that on the 22d of the same month he sent his children away. That Anna Maria Harris continued to reside in her husband's house, occupying apartments separate from his, until the 20th of March following, when Thomas Mottley, with whom she had been staying at Portsmouth (as before pleaded), having been sent for by her informed her, 'that he had been made acquainted with every particular of her conduct during her stay at Portsmouth, and especially with all that had occurred in Stanstead Wood between herself and Captain Robert Latouche.' That Anna Maria Harris asked Thomas Mottley, 'from whom he had heard the same?' when he replied, 'from the said Robert Latouche himself.' That Anna Maria Harris did not deny the said charge of Thomas Mottley, but exclaimed, 'that Robert Latouche was a dirty scoundrel, or dirty blackguard,' or to that effect; and asked Mottley, 'whether her husband had been informed of her conduct with Robert Latouche?' That on being told by Mottley, 'that he had not then communicated the same to George Harris,' she declared, 'that if he would not tell the same to him, she would immediately leave his house, and go to her parents in France:' and she thereupon did quit his house attended by Mottley, and proceed to join her parents in France. That a long negotiation afterwards took place in respect to a formal deed of separation, but which was broken off by George Harris. That the present suit was shortly afterwards instituted by Anna Maria Harris, and George Harris was afterwards for the first time informed by the said Thomas Mottley of the actual adultery of his wife with Robert Latouche."

At the hearing of the cause, the deposition of Mr. Mottley to the two parts of the above article (which are printed in *Italics*) was objected to. His deposition upon the second part, and the continuation of the first, are subjoined, the evidence to the first part being detailed in the judgment.

"The deponent, as also Mrs. Harris, remained at the house of Captain Harris until the morning of the 20th March, when they left it together; she to proceed to Dover, and he to Portsmouth: deponent saw her to the White Horse Cellar. In the intermediate time between the 13th and 20th of March, Mrs. Harris and Captain Harris lived separately, she keeping entirely in her own bed-room, where at her desire deponent had several further interviews with her, which ended in an arrangement (deponent acting by authority of Captain Harris) that she should proceed to her mother and father in France, and deponent furnished her with money for the purpose on account of Captain Harris. In the previous month of February 1827, Captain Harris came down to the house of the deponent alone, and told deponent that he had come in consequence of his brother, Mr. Henry Harris having informed him that he had received intelligence of a variety of improprieties committed by his (Captain Harris') wife, while she was staying at the house of the deponent: the deponent then informed Captain Harris all that deponent had

The real and true question arising upon this evidence is, whether it does or does not prove a confession of adultery; and in my opinion, the evidence of Mr. Mottley proves that, or it proves nothing.

Before referring to his testimony, the Court may observe, that it sees no reason to suppose that this witness has not given a fair and accurate account of the transaction to which he deposes. Indeed, the fact that he did not communicate what had occurred at Portsmouth, at an earlier period than he did, to Captain Harris, proves very clearly, I think, that

heard at that time of the conduct of Mrs. Harris, and which he believed to be true, namely of her walking the streets in a conspicuous manner, her writing notes to different officers, and of her general conduct having been the opposite to what it ought to have been; and Captain Harris was, in deponent's presence, informed of a variety of circumstances, specifying general acts of Mrs. Harris' misconduct, by Mrs. Mottley, and deponent's daughter, now Mrs. Matthews, from whom deponent had chiefly received the information he at that time gave Captain Harris. The deponent had not, at that time, received any information respecting the adultery of Mrs. Harris. The deponent (Mottley) continued to communicate with Captain Harris from time to time (after he left London in March 1827) on the subject of the separation; and was, by letter from Captain Harris, informed that a suit of divorce had been instituted against him by his said wife by reason of adultery; it was then for the first time that the deponent, by letter, communicated to Captain Harris that he (the deponent) had been informed by Captain Robert Latouche, that he (Latouche) had, after dinner on the 13th of September, 1826, in the wood at Stanstead, carnal connection with Mrs. Harris, while they were separated from the rest of the party. The information which the deponent so communicated to Captain Harris, he was in possession of on the 15th of March 1827, at the time of his interview with Mrs. Harris predeposed of; and it was to that information the defendant alluded in the conversation which he had in the morning of that day with Mrs. Harris already set forth; and the deponent, from the expression of resentment against Captain Latouche which Mrs. Harris uttered on that occasion, and other her conversation deposed of, did at the time and still does believe that Mrs. Harris understood that the deponent alluded to an act of adultery committed in the wood at Stanstead after dinner."

Upon reading Mr. Mottley's evidence, an objection was taken to the declaration deposed upon this article:—that the first declaration was general; that it applied to no specific transaction, and furnished no inference of criminal conduct; nor that Mrs. Harris knew to what Mottley alluded; and that the witness' communication by letter to Captain Harris was no evidence of the guilt imputed to his wife;—that Captain Latouche himself should have been examined.

On the other hand;—the twenty-second article was explanatory, and the purport of it was to show the conduct of the husband on being informed of his wife's guilt, and that a communication upon that subject was made at the time and in the manner pleaded. Even supposing that the declarations were not altogether admissible as evidence of Mrs. Harris' misconduct, yet still (whatever might be their effect) her observations were quite admissible: and they proved knowledge of Mottley's allusion. Why was this article of the plea not opposed?

Per Curiam.

The objection to this witness's deposition applies to two parts: in both it is founded on the same principle—viz. that the examiner has taken down hearsay, and therefore what is not properly admissible as evidence. But the Court has no doubt that the conversation which passed in Mrs. Harris' presence, and was not denied by her, is evidence: it cannot be considered as hearsay; for the declaration was addressed to her, and she acquiesced in it. In respect to the communication towards the end of Mr. Mottley's deposition on the same article; it certainly would have been more convenient if the examiner had confined himself to the language of the plea, and taken down the deposition in more general terms. But the question is, whether it is evidence at all, and if it be so, whether it is evidence as against Mrs. Harris. Now it cannot be received as evidence against her: the communication was introduced, in plea, *alio intuitu*; and, on principle, must be rejected as proof of the wife's guilt: nor is it required as explanatory of the husband's conduct: still, however, the Court has some difficulty in striking out the whole of this part of the deposition; it would, by such a course, be doing an injustice to the husband, since the Court has no power of substituting that which would be more general in its terms: it must, therefore, admit this communication to be evidence of the manner in which Captain Harris was first informed of his wife's alleged guilt,—but, of guilt, it is no proof whatever.

he was not actuated by malignant or improper feelings towards Mrs. Harris. There is no reason, therefore, to suppose, that the account which he has given of what took place between him and Mrs. Harris, is too highly coloured, or given with any improper bias. As this Court attaches considerable importance to this conversation, it may be necessary to refer to it more at length than the Court has done in respect to other parts of the evidence. The witness Mottley states:—"That in March 1827, in consequence of a letter from Captain Harris intimating a desire to see him, to consult with him upon the then existing differences between Captain Harris and his wife, the deponent came up to town from Portsmouth, and whilst he was at breakfast with Captain Harris, at his house in Brompton Crescent, he received a note from Mrs. Harris"—which is annexed to the witness' deposition, "expressing a wish to see him, she then occupying separate apartments from Captain Harris. After breakfast the deponent went up to Mrs. Harris, who, referring to the state of separation in which she was living from her husband, 'complained that she had been very ill, that her friends had deserted her, and that she had not a friend in the world, and did not know what to do.' She also acknowledged in general terms that she had been very culpable, but did not advert to any particular fact, or to any particular person."

Now, thus far, the declarations of Mrs. Harris appear to be quite in accordance with the letter which she had previously addressed to her husband, and which is annexed as an exhibit to his allegation. In that letter also she acknowledged herself generally to have been very imprudent, but her actual criminality she strongly and solemnly denied.(a)

(a) This letter—pleaded in the 23rd article of Captain Harris' allegation—was received by him two or three days after he had ceased to cohabit with his wife in February 1827; it was as follows:

"My mind is so distracted I must write: to see you I have not strength; or, if you turned me from you, I would attempt it. Oh Harris! what can I say, what can I do? Have you no love for me left, none that will urge you to consider my wretched state? I own to you I have been foolishly, thoughtlessly imprudent; but as to guilt, not even in thought—by all that I have to hope for in Heaven; never, never have I injured you. My God can witness how deep is my sorrow for my faults; but did you know my heart, you would not spurn it. Oh Harris! I ask you in the name of my blessed children and poor father to forgive me. Was I begging salvation, I could not implore it with more sorrow for my faults, or with a more broken and penitent heart than I now feel. Hear me, hear me, George, thou best of beings; and every hour of my life shall be for your future happiness. I feel my heart so nearly broken I care not for myself, but, my children, they are dearer to me than my heart's blood: oh think of them, look at my poor Jessie,—your own image, and pardon her poor mother for her poor sake in years to come. Turn me not from you to the scorn of a heartless world, which would brand me with adultery; and, what has been my fault?—lightness of conduct, and that to no extent. No, Harris, your honour by me was never injured, or I would not ask you to look over what is past. You will find plenty to urge you to think ill of me, you have all your friends near you, I stand alone without one friend in England, without one to take my part or give me one word of comfort; even Eliza has deserted me. Oh my blessed father, what would be his feelings did he know the state of his poor favorite child whose conduct from her infancy he has prided himself upon. He loves you, Harris, with pride and affection: then break not his poor heart by taking further steps against me; forgive me, take me once more to your bosom. I love you, George, but you will not believe me: I have acted without thought, but I have never injured you. God protect you for your goodness to me since my illness: think not I have no heart to feel and honour your noble conduct; still do I hate to be a burden upon you, nor would I, till I get your pardon, be in the house; but my heart will not let me leave my poor children. I know I am innocent of all crime, I defy all my bitter enemies to prove that I have ever once, during my stay at Mottley's, been out of his house for one minute alone, or any man to say I ever held one instant private conversation: this, as I hope for your and my children's eternal happiness and my own, I swear. After this a wo-

In the same manner the witness, Mr. Mottley, says "that she acknowledged herself generally to have been very culpable, but that she did not advert to any particular transaction, or to any particular person."

Afterwards, however, "the deponent, addressing Mrs. Harris, said, 'You must not deceive yourself, I know every particular transaction that took place during your stay at Portsmouth, particularly what took place between yourself and Latouche in the wood at Stanstead after dinner, when you were absent from the party.' Mrs. Harris looked surprised, and said,—'Did Latouche tell you?' Deponent replied, 'Yes.' Mrs. Harris then in great anger said, 'He' (meaning the articulate Robert Latouche) 'is a dirty scoundrel,' or used epithets towards him of the like tenor and effect. Mrs. Harris asked,—'Does George' (meaning her husband) 'know it?' Deponent said, 'he did not.' Mrs. Harris then said, 'that she knew it was impossible for her, after what had happened, to live with Captain Harris again as his wife, and that if the deponent would undertake that no further investigation of her conduct either in London or in Portsmouth should take place, she would quit his (her husband's) house.'"

Now it is, in my judgment, quite immaterial in what manner this conversation was introduced; the question is, under what impression Mrs. Harris made this declaration. It is no matter, as it appears to me, whether it was from the declarations of Captain Latouche himself, or from any other quarter that Mr. Mottley derived his information, or whether he had any information at all on the point. The real and substantial question that arises upon the evidence of Mr. Mottley is, whether Mrs. Harris did in fact adopt what was said by that gentleman as to the occurrences in the woods at Stanstead, so as, in effect, to admit that she had been guilty of adultery. It is quite clear, I think, that the evidence of Mr. Mottley is admissible for this purpose. In the case of "Burgess v. Burgess," 2 Consistory Rep. 233, 4, a declaration of this kind was given in evidence, and that evidence, though objected to, was received by Lord Stowell. In the same case, in reference to a letter which was not in evidence at all, but which the party, charged with adultery, had received from the person with whom the alleged adultery was committed, and which she had showed to her maid-servant, Lord Stowell said, when admitting the allegation in which this transaction was pleaded, "It may be of consequence to know how she (meaning the wife) expressed herself on this occasion; there may be something of joint acknowledgment;" and a little lower down, the learned Judge,—after stating that the husband had informed his wife of the confession of her paramour, and that she admitted "it was too true:"—says, "By this acknowledgment she adopts the confession, which was the same as if she

man may have acted thoughtlessly but not guilty: this is all I say to vindicate; see me, George, oh in your heart you cannot quite hate me. I have seen since your return a coldness in your manners: this I, with agony to my heart, thought arose from your affections being placed on another; but you say you knew of my conduct. Oh! had I known this, all should have been explained: think not, above all, this letter is studied or planned to draw your compassion, it is the impulse of my distracted heart. See me, hear me, once more on my knees I vow my love for you and ask your pardon with a true and fervent heart. Oh George, could you ever ask mine and be refused? For pity sake have mercy on your poor ANNA.

"I have tried to read this over, but it ill explains one half my sorrow for you, or one half my penitence for my faults, but I am too ill to write more.

"Once more receive me, and the blessings of one who has ever loved you."

had confessed it originally herself," *Burgess v. Burgess*, 2 Consist. Rep. 235. *notis.*

In the present case, it is not what Captain Latouche said, or whether he said any thing: it is what Mrs. Harris said, either directly to Mr. Mottley, or by way of inference. When Mr. Mottley informed Mrs. Harris "that she must not deceive herself, for that he knew every thing that took place whilst she was at Portsmouth, and particularly in the wood at Stanstead; she looked surprised, and asked, whether Latouche had told him; and upon Mr. Mottley giving her to understand that he had, she said, in great anger, that Latouche was a dirty scoundrel." Now, the anger which Mrs. Harris evinced on this occasion, may be somewhat doubtful. There may have been some familiarity short of adultery in the wood at Stanstead, and which she was indignant that Captain Latouche should have disclosed; but she goes on to ask, "Does George (meaning Captain Harris) know it?" and immediately after she says, "Now I know it is impossible for me ever again to live with my husband as his wife, I must quit his house, and I am ready to do so now if you will undertake that there shall be no further investigation of my conduct."

Previous to the declaration thus made to Mr. Mottley, Mrs. Harris had acknowledged that she had been guilty of levity, and had committed repeated improprieties. These admissions are to be found in her letter addressed to Captain Harris, to which I have already adverted: up to this moment she had denied that the ultimate result had occurred; and because the ultimate result had not occurred, she continued to entertain hopes of a reconciliation with her husband; but when she was given to believe that what passed with Captain Latouche in the wood was known to Mr. Mottley, and probably to her husband, she abandoned all hope of a reconciliation; and said, "it was impossible that she and her husband should ever come together again, or that he should ever again receive her as his wife after what had happened, and that she was prepared to quit his house." Now it is the opinion of the Court, that Mrs. Harris would never have so expressed herself—that she would never have abandoned the idea of being reconciled to her husband, and taken again to live with him as his wife—if she had not thought that there was proof of her having committed actual adultery, and that her husband had discovered, or was sure to discover, that proof. I think that the whole of her conduct corroborates this view of the case, and more particularly the circumstance of her leaving her husband's house forthwith and proceeding to join her relations in France.

This is the evidence of Mr. Mottley; and if it be considered to amount to a confession, it leaves no doubt remaining on this part of the case. It has been held that confession, when perfectly free from all taint of collusion, when confirmed by circumstances and conduct, as this admission is, ranks amongst the highest species of evidence. It has been so held on different occasions. It was most truly stated by Lord Stowell, in the case of *Mortimer v. Mortimer*, 2 Consistory Reports, 315, "that the Court was inclined to view confession, when not affected by collusion, as evidence of the greatest importance;" and the grounds upon which the Court laid down this principle are too obvious to need any explanation.

Upon a combination, then, of all the various circumstances of the present case,—Mrs. Harris' want of regard for her husband—her repeated—

ly avowed attachment to Captain Latouche—their absence from the rest of the company during the visit to Stanstead Wood—the total want of moral feeling on the part of Mrs. Harris, her disposition—so clearly portrayed by her letters and conduct,—if not to devote herself to the gratification of her passions, at least to act in a manner inconsistent with the preservation of her purity of mind; taking then, all these circumstances into consideration, together with the letters proved to have been written by Mrs. Harris—her declarations, her admissions, and the situation in which Mrs. Harris and Captain Latouche were left in the wood at Stanstead, amounting, as I have already remarked, almost to an incipient act of adultery, the Court does not hesitate in pronouncing, that the accusation of adultery against Mrs. Harris, has been fully and satisfactorily substantiated.

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The Court has now then to consider, whether any circumstances have been proved in the case, which are sufficient to prevent the husband from obtaining that remedy which the law, in the absence of any such circumstances, would afford to him? Captain Harris has been accused of cruelty and of criminal neglect. These are the charges against him, and I must here observe that the first of those charges has been introduced at a late period into the case. The charge of cruelty was no part of the original gravamen. The citation states the suit to have been brought by the wife for adultery alone. "The charge of cruelty, therefore, was not pleaded in the libel, nor could it indeed have been pleaded responsively to the allegation, admitted on behalf of the husband, charging Mrs. Harris with adultery; for there is no point, as it appears to me, more settled, than that cruelty cannot be pleaded in bar of a charge of adultery. The charge of cruelty, then, in this case arose incidentally upon interrogatories put to one of the witnesses, viz. Sarah Saunders, the cook: and having arisen in this way, Captain Harris had no opportunity of defending himself against it. As I before observed, even if this charge were proved, it would not be sufficient to repel the adultery committed by the wife; and such being the case, the Court, I think, is relieved from the necessity of entering into a further investigation of this charge."

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With respect to the next charge,—“that of criminal neglect,” pleaded to have begun nearly at the commencement of the married life of these parties, the Court—upon considering the whole of the evidence adduced in support of this charge—is of opinion that it is an antiquated charge, and wholly unsustained by sufficient testimony. This charge is founded upon the reception of Captain Vincent—an old and intimate friend of Captain Harris—(who was present at the marriage of the parties,) at his cottage, at Fulmer, after this officer had been confined with a severe rheumatic attack. It is alleged that at this period Captain Harris was guilty of criminal negligence, by leaving his wife in this cottage, which was very small, alone with Captain Vincent for days and nights together; but it is proved by Captain Vincent, to whom the Court does give credit, that during his stay with the parties at Fulmer, Captain Harris never slept away from home on any occasion. The Court is of opinion, then, that there is no foundation for any part of this charge; nor does it think there is any foundation for charging him with any want of due consideration and caution in regard to his wife’s comfort and accommodation at a subsequent period.

When Captain Harris was appointed to the command of the Hussar

frigate, his public duty obliged him to proceed to the West Indies, and it is in evidence, that he then left Mrs. Harris living at Fulmer Heath, and in the neighbourhood, and under the protection of, her own parents. Captain Harris, therefore, was not to blame, if a separation between Mrs. Harris and her parents afterwards became necessary under any circumstances, nor was it incumbent upon him to grant permission for his wife to proceed to France, even if he could have perceived or anticipated the catastrophe which did occur, and which induced the parents of Mrs. Harris to leave this country. The conduct of Captain Harris, therefore, in this particular, does not, as it appears to my mind, justly subject him to any imputation.

The most serious consideration, as regards the conduct of Captain Harris towards his wife, still remains behind. It has been alleged, and it is in proof, that Captain Harris introduced his wife to Mrs. Cary, who was at that time actually living in a situation which the Court must consider highly immoral and improper, and which could not have rendered her a fit acquaintance for the wife of a British officer.

To what extent Captain Harris wished this intimacy to go between his wife and Mrs. Cary, does not, I think, very clearly appear, though it has been a matter of much discussion. It has been contended on the part of Captain Harris, that he wished to restrain the acquaintance within very narrow limits. But if such were his wishes on the subject, it appears that his conduct was not quite in unison with them; for we find that having introduced Mrs. Cary to his wife before he left England, upon his return from the West Indies, he and Mrs. Harris took up their residence at her house, where they remained for a considerable time—it is immaterial to state precisely how long, but the evidence shows that Captain Harris and his wife resided there for several weeks. It is true, that Captain Harris had been acquainted with Mrs. Cary for many years, and that his brother, with his children, was residing under the same roof.

On this state of facts, the next consideration is the law applicable to those facts. "Upon this point, and upon the inference arising from the application of the law to such facts, I have no hesitation in saying, that the Court has bestowed much and painful consideration." On the one hand, the Court is most desirous not to relax the obligation, which the law imposes upon the husband, cautiously to protect and guard his wife from all associations that might expose her purity to hazard: or, by lowering her standard of female virtue, prepare the way for the inroads of the seducer. If indeed the Court is not sufficiently alert in maintaining the necessity, on the part of the husband, of jealously watching over the society, conduct, and habits of his wife, it may occasion an irreparable injury to the great bonds of domestic happiness and peace. On the other hand, the Court is equally anxious to introduce no new rule of law, and not to strain any admitted principle of law beyond those limits which have been affixed by the wisdom of its predecessors, and by the Judges of superior courts. If there be defects or inconveniences in the present state of the law, it is infinitely better they should be left apparent for the wisdom of competent authority to remedy, than that individual Judges should accommodate the law to their own notions of convenience, and by compromising admitted principles leave all in doubt and uncertainty. The conduct of Captain Harris in introducing his wife to Mrs. Cary has been termed criminal neglect, but this expression is much too indefinite

to enable the Court with any precision to measure out the legal consequences of such conduct.

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The principle which I find established, as applicable to the present case, is, that connivance and collusion destroy all claim to a remedy by way of divorce. This was held in the case of "*Forster v. Forster*," 1 Consist Rep. 144, and in a variety of other cases; and it is founded on the obvious principle, that no man has a right to ask relief from a Court of Justice for an injury which he was chiefly instrumental in effecting himself. *Volenti non fit injuria*. This principle is very clearly established; but what degree of neglect, however culpable, short of an actual and voluntary exposure of the wife to the seduction of an adulterer, would be sufficient, in order to bar a suit for divorce by reason of adultery, is nowhere laid down, at least with that distinctness and precision which would furnish a safe guide for the Court to act upon. The Court certainly does not recollect any case of the kind; but it can conceive that a case might arise of such wilful neglect, or rather exposure, as might, without proving actual connivance, possibly bar the husband of all remedy by a divorce. A husband might introduce his wife to society so abandoned, and expose her to risks so great, as to render a deviation from the paths of chastity the most probable, if not the necessary, consequence. Under such circumstances, perhaps, the Court would not wait for proof of actual connivance on the part of the husband, but would hold him to the consequences of his own conduct, when the adulterous connexion arose from the society and temptations to which he had introduced his wife.

x In the present case, beyond the fact that Mrs. Cary was living in a condition which the law can never sanction, however high the connexion may be, there is nothing proved to her disparagement. There is no evidence to show, that through her introduction, or under her roof, Mrs. Harris experienced any contamination of mind from loose conversation, or was exposed to the wiles of a seducer. The adultery of which the Court has pronounced her guilty, is wholly unconnected with her acquaintance with this lady; it neither emanated from her directly or indirectly; if it had, the case might be subject to very different considerations. Under such circumstances, the Court feels it too much to presume, that to this acquaintance is to be attributed Mrs. Harris' dereliction of her connubial duties: it cannot find any principle or precedent which would warrant it in saying, that the introduction to such an acquaintance alone amounts to connivance, or gives the wife a licence to indulge her criminal passions without affording to the husband such relief as this Court can administer.

The Court cannot but lament that Captain Harris should not have entertained a nicer sense of the delicacy due to the character of his wife: but it does not conceive that, under all circumstances, the law visits his want of caution with so serious a penalty as to leave him without remedy for her profligacy.

Taking then the whole of this case into consideration, I am of opinion that the libel charging Captain Harris with adultery has not been proved; but that Captain Harris has proved the fact of adultery charged against his wife in his allegation, and I therefore pronounce that he is entitled to the separation which he prays.

Easter Term.

ARCHES COURT OF CANTERBURY.

BUTT v. JONES.—p. 417.

On Appeal.

A faculty (for annexing a pew to a message) obtained by surprise and undue contrivance, may be revoked.

PREROGATIVE COURT OF CANTERBURY.

GLYNN v. OGLANDER.—p. 428.

On Admission of an Allegation.

Probate cannot be granted of a paper having nothing to give it a testamentary character; and not intended to operate upon the death of the writer; but to effect a gift *inter vivos*.

JANE MARY OGLANDER, late of Oxford, died on the 27th of January, 1829, a widow. She left her last will bearing date the 21st of November, 1825, and also a testamentary paper writing of the tenor following:

“My dear Sir,

“Wish to contribute something to those poor children of the two destitute families I do beg you to in the best mode of doing so I would sell out 5000

[The remaining three lines could not be deciphered with accuracy; but they were conjectured to be:—“thousand pounds for that purpose, which I beg you to divide between them. I rejoice that the Hays will be here so soon.”]

“Much yours,
“J. M. O.”

“Female children *or all the children* (a) of Robert Bathurst and Mrs. De Crespigny 500 ^{3 per cents} *or* (b) 5000 stock to be sold for their benefit.”

Superscribed

“Wm. Bragge, Esq.”

This paper writing was propounded as a codicil by Susanna Margaret Glynn, an executrix of the deceased's will. The allegation, in substance, pleaded:—

1. The death of Mrs. Oglander; and that by her will, dated the 21st

(a, b) The words and figures in italics were struck through with a pen. See the 4th article of the allegation.

of November, 1825, she specifically bequeathed 1690*l.* four per cents.; 33,500*l.* three per cent. reduced annuities, leaving 6100*l.* of the same stock, and the residue of her other effects, being at the date of her will, about 4000*l.*, chargeable under her will, with annuities of 175*l.*, and other legacies and charges, to Frances Dorothea Oglander and Susanna Margaret Glynn. That, after the date of the will, she invested, in the three per cent. reduced annuities, about 3000*l.*

2. That the Reverend Robert Bathurst died suddenly on the 24th of December, 1828, leaving a widow, two sons, and eight daughters, almost destitute; that Mrs. De Crespigny (Mr. Bathurst's sister) the god-daughter of Mrs. Oglander, was also in distressed circumstances, and had two infant sons and was pregnant at the time of the deceased's death. That on the 12th or 13th of January last, the deceased expressed, to Mr. Bragge, their cousin, compassion for the destitute condition of the two families.

3. That on the 16th of January the deceased, who was in the 72d year of her age, having been previously indisposed, was confined to her bed; Miss Gray, her friend, attending her. That on the evening of the 25th, the deceased desired writing materials to be brought to her; that she was raised in bed, and then wrote part of the paper writing propounded, which by her directions, Miss Gray sealed and addressed to Mr. Bragge, the deceased observing, "that it was not so urgent as to be sent immediately; that to-morrow morning would be time enough."

4. That on the morning of the 26th, Mr. Bragge called, and requested Miss Gray to inform the deceased that he required further instructions; that the deceased declined seeing Mr. Bragge, but informed him through Miss Gray "that the money was intended for the two poor families of the late Robert Bathurst and Mrs. De Crespigny;" that Miss Gray then wrote in Mr. Bragge's presence, at the foot of the deceased's note, "female children or all the children of Robert Bathurst and Mrs. De Crespigny 500 or 5000 stock to be sold for their benefit:" which memorandum she afterwards altered, by erasures and by an interlineation, upon further inquiries of, and explanations from, the deceased. That the deceased then directed Mr. Bragge to send for a power of attorney for the sale of the stock; and added, "I feel the most for the poor Robert Bathursts; but Caroline (Mrs. De Crespigny) is my god-daughter:" and in the afternoon of the same day, alluding to the same subject, she said, "the stocks are very high, it will produce a good sum." It was further pleaded, that the deceased (it was believed) did not, neither did Mr. Bragge, nor Miss Gray, know, that Mrs. De Crespigny had not a female child.

5. That the deceased thought her illness likely to be of long continuance; that she gradually became weaker, and died about six o'clock on the following morning, viz. the 27th of January. That on the 26th, Mr. Bragge wrote to Snow & Co., the deceased's bankers, for a power of attorney, which arrived by return of post.

6. Pleaded the hand-writing of the deceased; and exhibited Mr. Bragge's letter and the power of attorney. The allegation concluded with a prayer, that the paper writing propounded might be pronounced for as a codicil to the deceased's will.

Lushington for the allegation.

The King's Advocate contra.

JUDGMENT.

SIR JOHN NICHOLL.

Considerable difficulties present themselves in this case, arising from the form and contents of the instrument propounded. Courts of probate have gone considerable lengths to give effect to instruments, as testamentary, notwithstanding their form, where the intention, that they should take effect upon death, has been manifest. But I do not recollect a case, (and the learned Counsel in support of the allegation admits he is not able to point one out,) where a paper, not made to depend on that event as necessary to give it consummation, has been admitted to probate.

Here, the paper propounded is in the form of a letter to a friend, the writer wishing to do something for the benefit of two families who are there mentioned. The instrument itself is hardly intelligible for that purpose; but, independent of that circumstance, the whole history and extrinsic evidence, as laid in the plea, show that it was not a testamentary act, but a sale of stock for some immediate purpose, and to take place *inter vivos*. If the former were intended, why should the deceased have directed a power of attorney to be sent for? The parol declarations, pleaded in the fourth article, are full and detailed; but they are of no effect except as explanatory of the objects and amount of her intended bounty: the character of the paper must depend on the paper itself; it is not addressed to her executors; it has no reference to the will; no reference to her death. The whole tenor of the conversations and explanations is, that the benefit was intended as a present gift.

There are some circumstances in this case from which the Court would feel strongly disposed to wish it could give effect to the instrument propounded; but the Court must indulge no such wishes at the expense of the residuary legatee. To pronounce for this paper would be going a step beyond any former case. An instrument, conveying a benefit, whatever form it may assume, if it has the character of a testamentary paper to be consummated by death, may be admitted to probate. (a) In the present instance, the whole substance of the transaction is to sell stock for the benefit of the parties named in the paper; and this sale is to take place not by her executors, but by herself; not on her death, but immediately—as soon as the power of attorney could effect it. Upon these grounds I cannot consider this paper as testamentary; and I, therefore, reject the allegation.

Allegation rejected.

(a) See *Masterman v. Maberly*, *supra*, 103. *et seq.*

GROOM and EVANS v. THOMAS and THOMAS.—p. 493.

Where the deceased was admitted to have been insane before the execution of two ascertained wills, and where there was evidence of delusion and other *indicia* of derangement existing shortly before, as well as subsequent to the acts, proof of calmness, and of his doing formal matters of business, under the sanction of his family, are not sufficient to rebut the presumption against the papers.

Every person is presumed sane till shown to have become insane: the presumption then changes, and a party setting up any instrument executed after the existence of insanity, has the burthen of proof cast on him, and must show the mind perfectly restored, and delusion removed.

In civil suits the law avoids every act done during the period of lunacy, even though such act cannot be connected with the influence of the insanity.

ROBERT THOMAS, late of Fleet Street, Silk Mercer, the party deceased, died on the 16th of January, 1828: and the present suit was instituted by Thomas Groom and Robert Evans, executors named in a will of the deceased bearing date the 4th of July, 1826, against John Thomas, brother, and Thomas Thomas, nephew of the deceased, two of the executors named in a former will dated the 27th of August 1825.

Lushington and *Pickard* in support of the will, dated the 4th of July, 1826.

The *King's Advocate* and *Addams*, contra.

JUDGMENT.

Sir JOHN NICHOLL.

The point in this cause is the sanity or insanity of the testator, a sort of case which always depends on its own particular circumstances. The principle of law applicable to such a question admits of no controversy. Every person is presumed to be sane until it is shown that he has become insane: the presumption then changes: it is presumed that he continues of unsound mind, and the party setting up any instrument executed after insanity has manifested itself, has the burthen of proof cast upon him: he must show recovery, and he must show not merely that the party, whose act is the subject of inquiry, was restored to a state of calmness, and to the ability of holding rational conversation on some topics, but that his mind, having shaken off the disease, was again become perfect, was sound upon all subjects, and that no delusion remained.

It is sometimes supposed that rules respecting testamentary law prevail in this court different from the principles held in other courts; but that is not so: and, to show the concurrence of opinion in all courts upon the present subject, I will refer at some length to the report of the case of the Attorney General v. Parnter, 3 Brown's C. C. 441. The very marginal title, "general principles on cases of insanity," shows, that the observations contained in it, are of very extended applicability.

The case stated, "that Frances Barker, by a power of attorney duly executed on the 14th of December, 1780, impowered John Barker, her late husband, to receive certain dividends; that before that day she was of unsound mind, had ever since continued so, and was kept in confinement; that the husband received the dividends, made his will, and appointed the defendant executor; that a commission of lunacy had issued against Frances Barker, and that it was found she had been a lunatic, without lucid intervals, from the 17th of December 1783."

So that this verdict did not embrace the time when the power of attorney was made, the validity of which was in dispute.

The prayer was for an account of the dividends received by the late husband under the letter of attorney: and the defendants admitted that they knew Frances Barker had been occasionally, before the execution of the power of attorney, disordered in her mind, but that she appeared to the subscribing witnesses, at the execution thereof, to have the use and enjoyment of her senses and mental faculties sufficiently strong to fully understand and comprehend the nature of the acts she then did;

and that before she executed it, they explained the nature and effect of it, and expressly asked her if she did it with her free will and consent, which she readily answered she did.—On an issue at law being directed, the cause was tried before Lord Kenyon and a special jury. A great deal of evidence was given, by Mrs. Barker's attendants, to prove general derangement, though with intervals of sense. On the other hand, her being perfectly sound and competent at the time of the execution of the instrument was spoken to by the subscribing witnesses and others, in habits of intimacy with her, that she had also frequent intervals in which she was perfectly competent to do any rational act." There was, therefore, strong evidence of general competency, and of the absence of derangement when the instrument was executed: and the jury, without hesitation, found that Mrs. Barker was of perfectly sound mind at the execution of the power of attorney. Lord Kenyon, however, differed from the jury: he thought there was not proof of a sound mind; and upon an application for a new trial, the case was very elaborately argued; and in delivering his opinion, Lord Chancellor Thurlow entered very fully into the question; a new trial was granted; and upon the second trial, the instrument was held to be invalid. (a)

The case, then, of the Attorney General v. Parnter clearly shows, that Lord Kenyon (who differed from the jury), and Lord Thurlow (sitting in a court of equity) two great authorities—laid down principles and doctrines precisely such as are held in these Courts, and must govern the case before me. Another rule of law is, that, in civil suits, it is not necessary to trace or connect the morbid imagination with the act itself. If the mind is unsound, the act is void. The law avoids every act of the lunatic during the period of the lunacy, although the act to be avoided cannot be connected with the influence of the insanity, and may be proper in itself. This, indeed, is also to be collected from the case that I have already quoted.

In the present instance the fact is admitted and is proved, that the deceased had been actually insane before any testamentary act was done, or, as far as appears, ever was proposed by him. In the spring of 1825, being subject to fits he became so deranged, that he was attended by a keeper procured from a lunatic asylum. The question, then, is, whether before the testamentary acts he had recovered a state of sound and perfect mind: for becoming calm so as no longer to require restraint and coercion, and being so far rational as to be able to converse sensibly upon many or even most topics, will not be sufficiently conclusive. There are many persons decidedly lunatic who yet have the entire dominion over themselves and their affairs, and pass in ordinary society as persons of perfectly sound mind. Was this deceased, then, completely restored?

The deceased was Robert Thomas; he died in January, 1828, leaving a widow, no children, three brothers, two sisters, two nephews and a niece by a deceased brother. His real property is estimated at 2500*l.*, and his personalty at 5000*l.*: this property was acquired by him in trade as a haberdasher in Fleet Street, which business latterly had been managed by his nephew Thomas Thomas. John, the deceased's brother, is his heir at law.

The will propounded by Groom and Evans, the executors, is dated

(a) The Court read, nearly verbatim, Lord Thurlow's judgment, as reported in Brown's Chancery Cases, vol. iii. p. 442.

the 4th of July 1826, and it is opposed by his brother John, and his nephew Thomas two of the executors named in a former will of the 27th of August, 1825: that former will is in a cancelled state, and was so cancelled when the deceased executed the latter will: the former will is not propounded as against the widow and the other next of kin.

The deceased's sanity at the time of the execution of the former will is of course set up by the executors of that will, though they maintain that he was insane when he cancelled it, and when he executed the latter will: while the executors of this latter instrument have an interest in admitting and holding out, that, at the execution of the former he was sane; for his sanity at that time would lay the foundation for his sanity at the execution of the latter. Under these circumstances though both these parties allege his recovery in August 1825, yet that admission does not bind other parties, entitled as next of kin, or in distribution. The Court, though it only has to decide, directly, upon the validity of the latter will, yet for that purpose must look at the whole case, and must not assume, upon the admission of the present parties, that the deceased had actually recovered a testamentary capacity after the avowed insanity in the spring of 1825. The *onus probandi* lies on the executors of each will.

Mr. Vincent, an eminent surgeon, and a man of high respectability, gives this account:—

“The deponent attended the deceased professionally during the winter and spring of the year 1825, he had known the deceased for several years previous to that time; he the deceased having been in the habit of coming to the deponent's house to consult him for various complaints. In 1825, the deponent attended the deceased at his house in Chancery Lane in conjunction with Mr. Proctor of Fleet Street, who is a general medical practitioner, and for the most part saw him twice during each week from the commencement of his attendance until the deceased went to Richmond in the latter part of the month of July in the said year: the deponent attended him on account of eruptions and sores which he had about him, and not on account of the fits to which the deceased was also subject, as the deponent understood at the time, but cannot depose thereto, as he never saw him in any such fit or under the immediate effects of epileptic attacks, though from his knowledge of the constitution and habit of body of the deceased, the deponent apprehends the deceased was subject to determination of blood to the head which rendered him liable to fits; that during the whole of his attendance upon the deceased, as aforesaid, the deceased was in a state of mental derangement and insane, although during the latter part of it, just previous to his going to Richmond, he was more tranquil in his mind than before. The deceased during such period laboured under delusion of mind; he imagined he was haunted by a fiend, and he had a perverted apprehension of facts before him: the deponent did not again professionally attend the deceased from the aforesaid month of July, until the latter end of September 1826, and only once saw him during the intervening time, which was very shortly before and within a few days, as he now best recollects, of the 29th of September, when the deceased called alone on the deponent in Lincoln's Inn Fields, and of his own accord, gave the deponent a cheque on his bankers for the sum of five pounds in part payment of the deponent's previous professional attendance on him, for which the deponent had not received his fees: the deceased only remained a few minutes

on that occasion with the deponent, and nothing passed of any moment: the deceased only gave the cheque and talked of his complaints." [The witness afterwards refers to his books, and on interrogatory, corrects the date, and says it was on the 10th of May, 1826, that he received this cheque.] "The deponent further saith that he again attended the deceased on or about the 29th of September. The deceased was then resident in his lodgings in Hyde Street Bloomsbury, and from thence the deponent continued to attend him so long as he remained there, and subsequently at the house of Mrs. Chevalier in South Audley Street, to which place he removed, and also at Pentonville, (where he resided in lodgings, after he quitted Mrs. Chevalier,) until February 1827. During the said period, [that is, from the latter end of September, 1826] the deponent attended him twice each week on an average: the deceased did not on any occasion, during the last mentioned period that deponent attended on him, exhibit any symptoms of insanity: on all the occasions that deponent saw him in the said several lodgings, and on the aforesaid occasion when he called on the deponent, he, the deceased, conducted himself and talked and discoursed in a rational manner and was in the full possession of his mental faculties." All this, it must be remembered, was long subsequent to the execution of the latter will. He says further: "The deceased was a passionate and irritable man, and in the habit of expressing himself impetuously with respect to other persons in his conversation, but the deponent never observed him to be violent in his conduct and behaviour; he was usually in a state of nervous excitement, especially if any subject likely to make an impression on his nerves was brought forward: the deponent observed him particularly excited on some occasions when he spoke of his wife (Elizabeth Thomas,) and also on other occasions when he spoke of his brother John Thomas."

On this account several observations arise. Mr. Vincent did not attend the deceased for mental disorders, but as a surgeon for bodily disorders: from July 1825 to September 1826 he never saw the deceased, except at one very short interview. This period includes both wills. The deceased was subject to fits and determination of blood to the head; but they were not the object of Mr. Vincent's attendance. Some observations were made in argument on the nature and effects of epileptic fits,—that they were not likely to produce insanity. (a) I do not exactly comprehend the line of demarcation between fits of different sorts,—epilepsy, convulsions, apoplexy, paralysis, and other nervous affections: but I apprehend that all attacks upon the brain produce effects upon the understanding according to their degree, and the part of the brain attacked and under pressure. Persons may be subject to epilepsy of a mild sort—the mere falling sickness, which, when sensation is restored, produces scarcely any permanent effect upon the mind; while other fits of a severer sort produce very different consequences,—sometimes paralysis, sometimes delirium and derangement, and sometimes by a repetition, they reduce the patient to imbecility and idiotcy. But here we have the consequences; here is derangement—here is insanity in its essential quality, viz. delusion. The deceased fancied "he was haunted by a fiend, and had a perverted apprehension of facts before him." Before he went to Richmond, he became more calm; but according to Mr. Vincent, he continued insane till he went to that place

(a) The observations were quoted from Dr. Burrows' Commentaries on Insanity, pp. 155-6-7.

in the latter end of July: and yet during this very period, Mr. Young, ignorant of his insanity, prepared a will for him. After the deceased's return to town, when Mr. Vincent saw him in September 1826, and subsequently, he thought him sane: but Mr. Vincent was not peculiarly accustomed to insane patients, nor to the study and observation of mental disorders: his attention was never directed to ascertain whether the deceased continued to have "delusions in his mind and perverted apprehension of facts."

From repeated cases and high medical authorities which have, from time to time, been laid before this Court, it is clear that persons essentially insane may be calm, may do acts, hold conversations, and even pass in general society as perfectly sane. It often requires close examination by persons skilled in the disorder to discover and ascertain whether or not the mental derangement is removed, and the mind again become perfectly sound. When there is calmness, when there is rationality on ordinary subjects, those who see the party usually conclude that his recovery is perfect; and the family and those around the unfortunate person, partly from ignorance of the nature of the disorder, partly from delicacy in interfering, partly from their own wishes to believe him well again, form very incorrect opinions upon the subject.

The Court, then, is rather to look to facts, and to the conduct of the deceased, than to such opinions.

There are many circumstances which though not of themselves establishing actual insanity, which had not before become decided, are still strong *indicia* of its continuance,—such as great irritability, violent passions, occasionally deep depression, eccentric habits, suspiciousness, inconsistency, changeableness, and the like. If actual insanity never has existed many or most of these circumstances may occur, and yet not establish positive derangement: but where actual derangement has previously existed, lighter things become confirmations; or as Swinburne, for another purpose, expresses it, "if there be but one word sounding to folly, it is presumed that the testator was not of sound mind," Swinburne on Wills, part ii. s. 3.

The Court has fully read the account given by the several witnesses as to the different periods of time, and it is unnecessary to detail all the circumstances to which they depose: they are strongly symptomatic of unsoundness of mind; some of them, indeed, direct proof of it.

In the summer of 1825, as I have before stated, the deceased went to Richmond for change of air, and his wife resided there with him. Before he went he took up the idea of will making, and gave instructions for a will to Mr. Young, his solicitor, who prepared a draft for the deceased's consideration and sent it to him on the 4th of June, 1825. This clearly seems to have been the deceased's own act, and to have originated with himself: but the question which I shall examine presently is, whether it was the sane act, for insane persons are, from depression, often will-makers.

Mr. Young thus deposes, on the third interrogatory:—"Early in August (1825), John Thomas called upon the respondent and requested that he would go to the deceased, who was at Richmond and unwell, for the purpose of completing the draft of his will: the respondent went to and saw the deceased, who postponed going into the business of his will at such time. On the 25th of November, 1825, he attended the de-

ceased again, and then found that he had made a will when at Richmond."

At Richmond, then, this will was made, though when Mr. Young first called, the deceased postponed the matter.

While the deceased was at Richmond, at the latter end of the summer of 1825, he had another violent fit of apoplexy: from that fit, however, he recovered so far as to execute the will of the 27th of August, 1825, prepared there by a solicitor. On the morning of that day the instructions for the will were taken by the deceased's brother to the solicitor's office; in the afternoon the will was sent for the deceased's approval; and in the evening it was executed: so that the whole matter was done in haste—on the same day,—the execution was a mere formal act—and the solicitor hardly saw the deceased.

This is slender evidence in order to show restored soundness of mind, so soon after a fit,—more especially as no persons are before the Court competent to question its validity. But the history of these different testamentary acts may tend to illustrate each other, and I will consider them presently.

The deceased having returned from Richmond at the latter end of 1825, had subsequently a recurrence of his fits. In March of the following year he went down to Birmingham to visit his friend Groom: this was much against the wishes and inclination of the deceased's family: his brother was at that time from home, but the family begged the guard of the coach, by which the deceased travelled, to look to him. On the road it appears he conducted himself strangely: at Birmingham he was again taken ill; his brother went down there, and accompanied the deceased back to town. In May, or rather later, his shop and business were sold off, and in July he went to lodge in Hyde Street, Bloomsbury: there he continued till the latter end of the year, when he removed to Mrs. Chevalier's in South Audley Street, and afterwards to Pentonville. I have thus passed over the general history very rapidly, because the state of the deceased during May, June, and July, 1826, the most material period in respect to his continued insanity, or perfect recovery, is deposed to by a great number of witnesses: and considering their evidence—not merely their opinions but the circumstances which they relate—it is difficult to believe that the deceased's mind had been restored to a state of soundness.

It has been relied upon that he was treated as a person of sound mind; that he executed instruments—powers of attorney—deeds of assignment—drafts on bankers; but is his recovery correctly to be inferred from these circumstances? It is necessarily the case, where the person is in the hands of his family who are unwilling to take out a commission of lunacy, that, under their sanction, such formal acts should be done and such instruments signed: but it seems that the person and concerns of the deceased were managed by his wife, his brother, and his nephew, and not by himself. Though they did not coerce his person (except, indeed, when excited into violent paroxysms of passion), yet they watched him closely: they humored and pleased him by bringing the servant, or rather the apothecary, (the brother of the person who was recommended as his attendant) and allowing the deceased apparently to engage him; and they carried him to see the lodgings in Hyde Street; but it was the family, and Mr. Young, the solicitor, who managed him and his concerns: they had a general power of attorney to dispose of

his business and his property; and though the deceased executed the formal instrument, and the assignments and the drafts, it is quite manifest that the wife, the brothers and the nephew, as I before mentioned, sanctioned by Mr. Young, very naturally and very properly conducted every thing: they, considering it unnecessary to take out a commission of lunacy, as the deceased was very calm, acted for him: they placed him in lodgings in Hyde Street, and they removed him when Mrs. Strutt and her other lodgers would no longer suffer him to remain.

Just previous to his going into these lodgings, the deceased fancied that his nephew would become insane and wish to murder him: the nephew, to humour the deceased's fancy, and not excite irritation, for a time left the house; still, so strong was the delusion, that the deceased would have the house searched at night, and secured in order to protect him from this nephew, "who looked wild and was becoming insane." And yet, with the inconsistency not unusual with insane persons, he suffered this nephew to be one of the persons to dispose of his concerns under the power of attorney. What I have been referring to was about the very period when he was making this will—viz. in June, 1826. The day before the execution of this will, he was lodging in Hyde Street; and the account of his general conduct, while there, strongly marks a continuance of his disorder: among other circumstances, there was one of manifest delusion: the deceased had fancied, that the statue at the top of Bloomsbury Church often nodded at him, and could not be dissuaded from it, nor convinced that it was fancy only. It was, as I have stated, about this period that he again commenced will-making.

It was argued that the deceased was not insane when he made this will, because he benefitted by it his wife, his brother John, and his nephew; so that it was said, there was no evidence of delusion affecting his testamentary disposition: but an inconsistency of that kind is no proof of the absence of disorder. He suffered his brother and his nephew to manage his concerns; and he suffered his nephew to drive him out in his gig. Insane persons are not consistent with themselves in every particular, nor does the same delusion always haunt them. Without, then, entering minutely into the circumstances, I am satisfied by the evidence that the deceased had not recovered into a state of perfectly sound mind, but that his derangement continued generally during these months, so as to require a clear and decided lucid interval to be proved, if indeed it could be established: for where there is not actual recovery, and a return to the management of himself and his concerns by the unfortunate individual, the proof of a lucid interval is extremely difficult.

Insane persons, who have an object to effect, will not often set about it with method, and in a manner apparently rational: it is difficult, even for experienced persons, to detect their insanity. It is no reflection, then, upon the solicitor that he was deceived, and did not discover the deceased's derangement. Mr. Young states that he received from the deceased his testamentary instructions; and he seems not to have suspected his sanity; he therefore took no means to ascertain the fact,—and why?—because he was ignorant of the delusion under which the deceased had previously, and at that very time, laboured, and also of the particulars of his general conduct. Mr. Young himself gives an account of behaviour not far distant from unsoundness of mind: it is thus that he deposes on the ninth interrogatory: "He does not believe that the de-

ceased was at times, either previous or subsequent to the execution of the will of the 4th of July 1826, of unsound mind: the respondent did not at any time in June and July 1826, or for several months either before or after the execution of the said will; neither did his fellow witnesses, or either of them to his knowledge or belief, treat the said deceased as a person of deranged intellect or unsound mind:" and yet there is clear proof of it in 1825, by the deceased having been attended by a keeper. "The respondent not being upon terms of intimacy with the deceased, does not know how his family treated him." So that Mr. Young was only resorted to in order to advise the family on formal legal proceedings. Further on, upon the same interrogatory, in reference to some declarations, he says:—"After a meeting, (the date of which he does not recollect) between the deceased and John Thomas, at which they had quarrelled upon the subject of the affairs of the testator's father, which subject frequently led to violent language between them; the respondent, upon that occasion may have said, 'that the deceased was not fit to be talked to on business after such disputes,' or to that effect: the respondent always finding that after such disputes the deceased was from irritability of temper apt to revert to the immediate cause of the dispute rather than confine his consideration to the business in discussion before the dispute arose. That at different times the respondent has refused to proceed in conversations of business with the deceased, whilst under excitement originating from such disputes with John Thomas and other members of his family; and, at others, respondent, by representing to him that he would not sanction violent language between relations, and if it were persisted in would postpone further conversation, has succeeded in obtaining the deceased to attend to the original subject of meeting. He does not know that the deceased was otherwise than of sound mind during June and July 1826."

The witness, therefore, it is clear, knew nothing of the deceased's delusion as to the statue upon the top of Bloomsbury Church, nor in respect to his fancied apprehensions from his nephew.

Again, on the thirteenth interrogatory, Mr. Young thus deposes:—"He does in his conscience, so far as his intercourse (limited as it was) with the deceased enabled him to judge, disbelieve that the mind of the deceased was always, after the month of April 1826, in some degree deranged: respondent scarcely ever having occasion to converse with the deceased except on matters of business, and making allowance for ill health, and allowing him more time for collecting his thoughts and expressing his sentiments than a person in good health would require, found him competent to business: but it has occurred upon several occasions, when the respondent has attended the deceased by appointment upon business, that respondent has considered it right to defer such business either from the deceased being feeble from ill health, or under irritation arising from causes into which respondent did not consider it incumbent upon him to inquire; upon all occasions being aware that the deceased was not upon friendly terms with his family in general. The respondent does not recollect to have heard that the deceased was in June 1826 labouring under a delusion that his nephew, Thomas Thomas, would cut his, the deceased's throat, or that his brother, John Thomas, would murder him: but respondent has heard and believes that Thomas Thomas, who for many years lived in the deceased's house, did in or about the said month of June, quit the same in consequence of some disagreement

with the deceased, but he does not know and cannot form any belief as to the particular circumstances or grounds of such disagreement."

The whole account, therefore, of this gentleman shows, that he was quite ignorant of the cause of the deceased's condition, nor did he inquire into it. I infer, then, from Mr. Young's own evidence, that the deceased had not recovered, and that not being intimately acquainted with his family, Mr. Young did not ascertain what was the real state of his mind.

The Court sees no reason to doubt the fairness and sincerity of Mr. Young's conduct and testimony; but he had not before him the whole facts relative to the deceased's condition of mind, and he formed an erroneous judgment.

But what passed in the preceding year? In May 1825, the deceased went and gave instructions for a will. Mr. Young did not then detect any disorder of mind: he prepared the draft of the will; he sent it to him on the 4th of June: and yet from Groom's and Evans' own witness, Mr. Vincent, it appears the deceased, in May, June, and July 1825, was in a state of decided insanity; and during a great part of the time was under the care of a keeper, which Mr. Young neither knew nor discovered.

A strong symptom of insanity is fluctuation of mind—unsteadiness—changeableness. Here are three instruments—the draft of June 1825, the will of August 1825, and the will propounded of the 4th of July 1826: and there are considerable variations in each. Several of the legacies in the draft of June are omitted, or altered, or added to in the will of August. Not only are the legacies varied in many respects, and without any apparent reason, but some omissions were supplied at the time of execution. Such are the two legacies, the one of 100*l.* to his sister Elinor Evison, and another to his sister-in-law, Mrs. Wenlock: these two legacies were interlined at the time of the execution. Here are also the legacies to the executors increased from 100*l.* to 150*l.*; and the other alterations are very material. In the will of August 1825, the wife has an annuity of 150*l.* and a legacy of 100*l.*; but in the will of July 1826, the annuity is reduced to 120*l.* and the legacy to 50*l.* And the residue, instead of being given, as under the will of August, to his brothers John and Francis Thomas, and his nephew Thomas Thomas equally, is left to his brothers Francis and Arthur, and to his nephew John, son of Richard, a deceased brother. The legacy also to John Thomas, the brother, is reduced from 500*l.* to 250*l.* It is not then, I think, probable, that as Young had had several interviews with the deceased, that there would have been any fluctuations at the time of executing the will, if his mind had been steady, and sound, and settled.

These circumstances, therefore, strongly mark the unsettled state of the deceased's mind. Let it not, however, be supposed that the Court holds change of mind, and interlineations in a testamentary instrument, to be, *per se*, a proof of insanity, but coupled with the previous insanity and the general description of the deceased's conduct, they are circumstances carrying symptoms of disorder into the act itself. What says the great poet of nature and master of the passions upon the subject? What is one of the tests of madness that he suggests? Hamlet being charged with "coinage of the brain," answers:—

"It is not madness
That I have uttered; bring me to the test,

And I the matter will re-word; which madness
Would gambol from."

Madness, then, varies and fluctuates: it cannot "re-word"—if the poet's observation be well founded; and though the Court would not at all rely upon it as authority, yet it knows from the information of a most eminent physician that this test of madness, suggested by this passage, was found, by experiment in a recent case, to be strictly applicable, and discovered the lurking disease. (a)

In this case the deceased did not "re-word:" he varied and added and omitted without any change of circumstances to account for these fluctuations of intention. He assigned no reason, he was asked no reason, for these alterations and changes. It is impossible to surmise what fancies a deluded imagination may take up and act upon; and, on that very account, the law has wisely ordained, that where any delusion exists at the time, it is not necessary to connect that delusion with the act done, and which it is sought to avoid.

Here, indeed, the fancies of the deceased were not wholly unconnected with the testamentary disposition: he fancied his nephew wanted to murder him; he quarrelled with his brother: they were displaced from being executors and residuary legatees, and they have a very inferior benefit; he might not be perfectly consistent in leaving them any thing; and, in doing the act itself, he might be so apparently rational as not to expose his derangement of mind to the solicitor who had no previous suspicion of it.

Upon the whole, then,—for the deceased, after the execution of the will propounded, never once adverted to it in any way, although he lived so long after the act,—the Court is of opinion, that the will is invalid.

The deceased had been decidedly insane in the spring of 1825: the account given of his subsequent conduct and condition tend strongly to show that no real recovery had at any time taken place, notwithstanding he had become calmer and could converse rationally upon some matters, yet there were many symptoms of continued disorder; and in the months of May, June and July, he was subject to delusions of mind.

These testamentary acts, first taken up after actual insanity and during its decided existence, are varying and fluctuating, without any change of circumstances or reasonable cause to account for them. I am, therefore, led to conclude that the presumed unsoundness of mind continued, and that the deceased was not in a state of testable capacity, but was *non compos mentis* at the time when the will was made. I must, therefore, pronounce against the will propounded.

The will of August, 1825, was then propounded *apud acta*, and upon its being stated that no further evidence could be obtained in support of it than was already before the Court, the Court pronounced also against that will; and that, so far as appeared, the deceased was dead intestate.

Lushington prayed the costs of Groom and Evans out of the estate; they had acted under the advice and opinion of Mr. Young and Mr. Vincent, as to the sanity of the deceased.

(a) The Court was understood to allude to the case referred to in a note to page 242 of the tenth number of the new series of the "Quarterly Journal of Sciences and the Arts."—London, 1829.

Per Curiam.

They were, no doubt, both sincere and honourable opinions; but the executors were not under the necessity of propounding the will: they had ample opportunity of judging of the deceased's state; and should have decided for themselves. I do not at all blame the executors; they have not acted improperly; but it is not the sort of case in which the Court can give the costs out of the estate.

Costs out of the estate refused.

Trinity Term.

126.

ARCHES COURT OF CANTERBURY.

The Office of the Judge promoted by
BURGOYNE v. FREE, D. D.—p. 456.

Upon the proof against a clergyman, of repeated and habitual acts of incontinency, coupled with neglect of duty and other conduct affording just scandal and offence to his parishioners, the Court is bound to proceed to deprivation.

Exceptive allegations, after publication, are *stricti juris*; and their object being the credit of the witness,—not the proof of the matters in issue in the principal cause;—1st, Facts which might have been pleaded in contradiction to the pleas before publication, cannot be pleaded in contradiction to a witness: 2ndly, There must be a contradiction to the depositions clear and capable of proof, and showing that the witness has deposed falsely and corruptly: 3rdly, The matter must arise out of the evidence (not out of the general character) of the witness.—Allegation rejected.

BEARBLOCK and BEARBLOCK v. MEAKINS.—p. 495.

To set out the tithe of potatoes by the tenth basket, as raised, and immediately remove the nine parts is not sufficient: a reasonable quantity must be raised before the setting out in order to afford to the tithe-owner a fair opportunity of view.

HARRIS v. HARRIS.—p. 511.

160-> s. s. e.

On Appeal.

The wife's adultery being proved, and a similar charge against the husband failing, his relief is not barred by a slight want of caution on his part.

FROM the sentence of separation pronounced, in favor of Captain Harris, in the Consistory Court of London, (a) Mrs. Harris appealed: and the cause was argued upon the same evidence and by the same

(a) See Harris v. Harris, *supra*, 160-> 8.

counsel, as in the first instance. The counsel for the wife submitted, that the Court might arrive at one of four conclusions.

First, That adultery was proved against the husband, and not against the wife.

Secondly, That it was proved against the wife, and not against the husband.

Thirdly, That it was proved against both the one and the other.

Or, fourthly, That it was proved against neither party.

That if the Court should arrive at either of the first two conclusions, it must necessarily pronounce a sentence of divorce; but if at either of the latter, there must be a dismissal of both parties: and that, at least, ought to have been the judgment of the Court below. They maintained, that the decision was a departure from principle and from precedent; that the charge of adultery, alleged against the wife, was satisfactorily disproved, while of the husband's guilt, there was strong presumptive evidence—stronger than what had frequently been held, in the ecclesiastical courts, to amount to a legal conclusion of guilt: and they cited *Loveden v. Loveden*, 2 Consistory Reports, 2. [post.] to show, that it was "a fundamental rule that it is not necessary to prove a direct fact of adultery." (a)

JUDGMENT.

SIR JOHN NICHOLL.

This appeal from the Consistory Court of London was, originally, a ⁷⁴³⁵⁰ suit for separation by reason of adultery, brought by the wife against the husband; and the result of the cause in the Court below, though not irregular, was not very common. The husband denied his own guilt, and gave in a recriminatory charge; both parties prayed a separation: and the sentence of the Court was, that the wife had failed to support her libel, but that the husband had proved his allegation: and accordingly decreed a separation. From that sentence the wife has appealed, and the cause has been heard in this Court on the same evidence.

The proceedings are voluminous: several pleas were admitted; and many witnesses examined. The wife gave in her libel; the husband, a defensive and recriminatory allegation: a second allegation on the part of the wife, and a second responsive allegation for the husband, were also admitted. For the wife, twenty-three, for the husband, fourteen, witnesses were examined, making together thirty-seven.

If on a consideration of this case, after the full and able argument it has undergone, I had been obliged to differ from the sentence of the Consistory Court, it would have been necessary to enter minutely into the evidence in order to show the grounds on which, in my opinion, the sentence could not be sustained: but as I have arrived at the same result,—presuming that the Chancellor of London stated the circumstances in detail—I do not feel called upon to repeat them. I may here observe, that I was induced to hear a reply, in order to afford Captain Harris' counsel an opportunity of saying any thing further, that they might consider advisable, in defence of the character of the second lady with

(a) In the course of the argument a part of Mr. Mottley's evidence was again objected to (see ante, p. 171, *in notis*): but the Court,—having directed the ninth article of the libel, and the twenty-second article of the first allegation, with Mottley's evidence upon it, to be read,—overruled the objections, intimating at the same time some doubt, whether the objections could regularly be renewed in the Court of Appeal, as the admission of the evidence by the Judge of the Consistory Court formed no part of the appeal.

whom he is charged to have been guilty, and to repel the imputations which parts of the evidence were calculated to reflect upon her.

The parties married in November, 1821: the husband being a post-captain; the wife—the daughter of a gentleman residing near Fulmer, in Buckinghamshire. Soon after their marriage they went to reside near her father's; and have had two children—a son and a daughter. In August, 1823, Captain Harris was appointed to the command of the Hussar frigate: after having been employed for a short time at Lisbon, he came back to this country; in December, 1823, or January, 1824, he sailed to the West Indies; and returned to England on the 13th of October 1826. Upon quitting England, his wife and one child were left at Fulmer; and another child, of which Mrs. Harris was pregnant, was born after his departure. During Captain Harris' absence, a change of circumstances induced his wife's parents to go to France; she did not accompany them; but, after staying some time at Fulmer, she went to various places,—Blackheath; Sloane Street; Brighton; and paid long visits to Mrs. Cary, at Fulham: but of her various residences there is not much evidence before the Court. On the 4th of September, 1826, the Hussar being expected, she, at the invitation of Captain Harris' friends—Mr. and Mrs. Mottley—went with her children to Portsmouth, to meet her husband: there she remained five weeks before the arrival of the Hussar, which had been detained on her homeward voyage by orders to go to Vera Cruz. On the 18th of October the Hussar went round from Portsmouth to Chatham: Mrs. Harris did not take a passage in the vessel; but, on the 25th, returned to London by land; and was for some time on a visit at Mrs. Cary's, while a house in Brompton Crescent, which Captain Harris had taken on the 29d of October, was preparing. In this house they took up their residence early in December, and continued in it till their separation in March, 1827.

After this short history of their cohabitation, I will proceed first to consider the charge brought by the wife against her husband: it has this peculiarity,—that the subject of it was not the cause of the wife's withdrawing from cohabitation. For what are the facts here? First, Captain Harris having taxed his wife with imprudence during his absence, she wrote a letter confessing great impropriety and begging forgiveness: afterwards, Captain Harris having, on further inquiry, accused her of criminality, and though still desirous not to expose her publicly insisted on a separation and obliged her to quit his house, she suggested no charge of adultery against him; but at length—after this admission of her own misconduct, and after thus submitting without a hint of her husband's guilt (either in any declaration to Mottley, or in her letter of February) to be driven from her husband's roof under this degrading imputation on her honour,—she institutes a suit alleging adultery on his part, and praying a sentence of separation. Her case, then, does not set out very strongly.

The first charge in the libel is, that, while Captain Harris was in the West Indies, and at Vera Cruz, a Mrs. Waverly remained with him on board the Hussar for several days; that many familiarities took place between her and Captain Harris, and that they committed adultery. Two witnesses, the surgeon and the captain's clerk, examined to this charge, both negative it: they are the wife's own witnesses; but they depose that they never saw any familiarity, and that they do not believe that any adultery or indecent act occurred. There are, besides, some facts to

explain the circumstances under which Mrs. Waverly was received and continued on board, such as will not warrant the Court even in suspecting any criminal intercourse between her and Captain Harris.

The other charge is with a lady of rank and character; and which, if unfounded, is cruel and unpardonable. It appears, that while at Barbadoes, Captain Harris became acquainted with the chief officer of engineers and his lady. In May, 1826, this officer was obliged, by duty, to make a visit of inspection through the colonies; and Captain Harris undertook to convey him. This officer's lady was in ill health and recommended to accompany them: on their return her health was not improved; and, under the advice of medical gentlemen, her return to England was determined upon. Captain Harris engaged to bring her to this country; and she came home passenger in the Hussar, attended by two female servants—an elderly woman and a black girl. When the ship was at Vera Cruz, this lady expressed a great anxiety to procure a passage direct to England; but this she did not accomplish. When she landed at Portsmouth, she went to an hotel, and was there visited by Mrs. Harris and the friends with whom that lady was staying. She then came to London, and took lodgings, first, in Regent Street, and afterwards in Sloane Street near the residence of her own family. There both Captain and Mrs. Harris visited her: Captain Harris showed her attentions; but they were such as the circumstances would naturally lead to; and did not go beyond that polite and kind civility, which was due to her, and which was to be expected from a gentleman intrusted with the protection of a friend's sick wife.

The two witnesses, who were on board the Hussar and have been produced on the libel, negative any suspicion of improper familiarity during the voyage. The cabins of Captain Harris and the lady in question were on different sides of the ship, though of course that did not exclude a possibility of intercourse. Again, though it is pleaded that Captain Harris visited this lady at her lodgings, and every witness is produced that could be mustered to state some impropriety, yet (with one single exception) there is not a witness who speaks to the slightest familiarity or impropriety of conduct: there is not one that believes any criminality, except a young girl—Mary Ann Payne; and she relates circumstances so utterly inconsistent with probability, and all the other facts, as to deserve no credit whatever, even if she were not contradicted by the other evidence in the cause: her story is so at variance with probability, that it is sufficient to defeat itself. The impression made by this witness' testimony on my mind is, that, so far as it would tend to prove criminality, it is mere invention and gross falsehood. In this part of the case, without entering into more detail, I fully concur in the sentence,—that Mrs. Harris has failed in proof of her libel. The charge seems to have been framed upon a notion, that the best means of defence was to commence the attack.

I now proceed to the second branch of this case,—the charges against the wife.

It is unnecessary for me to trace Mrs. Harris to an earlier period than the beginning of September, 1826, when she and her children went to Portsmouth to await the expected return of the Hussar. Conduct of greater forwardness, more dissolute short of actual prostitution; expressions, written and spoken, more grossly departing from the modesty of a virtuous matron; passions more inflamed; advances more impudent

and barefaced, cannot well be imagined: and the proof depends not merely on the depositions of the witnesses, but is confirmed by her own letters, coupled with admissions of great improprieties, at least, and expressions of deep contrition. Against a married woman—the mother of two children, the return of whose husband, after an absence of two years on the public service, was daily expected, who could write such letters to officers of the garrison, and act and talk as she did, and who had a mind thus tainted,—there would not be much difficulty in presuming criminality whenever a favourable opportunity and other circumstances to raise a suspicion, occurred. Whether her morals had become corrupted by the society she so much cultivated during her husband's absence: whether her passions were inflamed by his expected return; whether she considered there was less risk of detection by pregnancy on the eve of his arrival, it is obvious from her declarations that her affections no longer were directed towards their legitimate object: the meeting with her husband was not the gratification she anticipated; she sought other objects.

Looking to these circumstances as detailed in the evidence,—for to state the particulars, or to read passages from these letters, is unnecessary, and therefore from their corrupting and demoralizing tendency unfitting;—the Court has a strong judicial conviction, that, on the 13th of September, 1826, at Stanstead Wood, Mrs. Harris was guilty of adultery with Captain Latouche. The subsequent circumstances, if confirmation were required, tend strongly to strengthen that conviction. The Hussar sailed for Chatham on the 18th of October, after Captain Harris had slept on shore five nights: she declined to accompany her husband in that vessel, but promised to return to London on the following Monday, the 23d; yet she lingered at Portsmouth till the 25th.

The day after the vessel had sailed for Chatham, a conversation took place between Mrs. Harris and Mrs. Mottley, to which the latter thus deposes on the eighteenth article:—"At dinner Mrs. Harris complained of being poorly and could not eat any thing: deponent inquired the cause and Mrs. Harris said, 'I'll bet you five pounds I am in the family way:' deponent said, 'How can you fancy such a thing?' to which she replied, 'I'll also bet you five pounds that I shall be confined at the end of eight months;' adding also, 'that she had gone only eight months with one of her children, and that the same thing had happened to her sister.' It then, for the first time, struck the deponent that the party in Stanstead Wood had taken place exactly a month before, and deponent then believed and still believes, that such conversation was addressed to the deponent for the purpose of misleading her, and of accounting hereafter for the birth of any child of which she might be delivered within a period less than nine months from her husband's return; and deponent believes an act of adultery was committed, on the 13th of September, 1826, between Mrs. Harris and Captain Latouche."

Captain Harris, at the time at which this conversation took place, had been at home only six days, yet she anticipated pregnancy, and an eight months' child: these are very speedy suspicions. The opinion and inference of the witness do not guide the Court, but the great difficulty is in not arriving at the same conclusion. Mrs. Harris was, in truth, pregnant; for, in the month of February, she miscarried, which was the reason she was allowed to remain for some little time in the house of

her husband, after their separation. Upon this part of the case again, I concur with the sentence of the Chancellor of London.

Against this proof of guilt, another ground of defence was attempted ¹⁷⁶ to be set up, namely, that Captain Harris was the corrupter of his wife, the author of his own dishonour. Two instances are adduced: first, that, soon after his marriage, he invited a friend, Captain Vincent, who was present at the marriage, but who at the time in question was unwell, to spend some days at the cottage at Fulmer, and that he slept in an adjoining room, between which and Captain and Mrs. Harris' room there was only a thin partition. To rely upon this as any justification of her adultery five years after, or as any bar to her husband's relief, or that it was considered by either of the parties as attended with any impropriety, is hardly worthy of observation: it was not, indeed, much pressed in argument.

The other instance is, that he introduced his wife to Mrs. Cary. It appears that Captain Harris and his family had been for a very long period—thirty years—intimate with Mrs. Cary. Mr. Henry Harris and his daughter were residing at her house. Captain Harris and his wife had very little intercourse with her before he sailed to the West Indies; and it was during his absence that Mrs. Harris herself cultivated this acquaintance into very great intimacy. The general conduct and deportment of this lady is described as quite consistent with decorum; though it is true that she was visited by an illustrious individual, now no more, on terms which nothing can justify; at the same time there are circumstances arising from the impossibility of a legal marriage which may, in the eyes of the world, distinguish such from other immoral connections, and may be received in some degree as an extenuation.

It is not necessary for the Court to assent to the strict propriety of Captain Harris making such an acquaintance for his wife. But however much right moral feelings may be disposed to censure the overlooking of any departure from female virtue, under any circumstances, and thereby giving a degree of countenance to immorality and vice, yet sitting here to administer the *law*, it is impossible to hold that the circumstances, in this case referred to, will bar the husband of the remedy which he claims on account of his wife's adultery.

Upon the whole, the sentence appealed from must be affirmed.

PREROGATIVE COURT OF CANTERBURY.

WAGNER v. MEARS.—p. 524.

Where capacity and volition are established, a party suing *in forma pauperis* who after a long acquiescence calls in probate of a will, on a suggestion of incapacity, fraud, and circumvention, may be condemned in costs; and the taxation be suspended.

Curteis, on behalf of Mrs. Wagner.

Lushington and *Dodson* contra.

JUDGMENT.

Sir JOHN NICHOLL.

The deceased, Ann Jones, died a widow, so long since as the 28th of December, 1821; she left several nephews and nieces of two different

branches, viz. three nephews and two nieces of the name of Newbury, and two nieces of the name of Norton. On the 8th of January, 1822, probate of her will dated on the 30th of November, 1821, was granted to Susanna Norton and Sarah Mears (formerly Norton) executors: by this will she left Edward and John Newbury 20*l.* each for mourning, Samuel Norton 500*l.*; her plate, household furniture, and trinkets, she gave, in equal shares, to the Nortons; and tied up certain property in trust to pay Edward and John Newbury 2*l.* a week each; and bequeathed the residue to Susanna Norton and her sister Mrs. Mears. The property was sworn to be under the sum of 14,000*l.*

This probate remained undisturbed for seven years, and, in the mean time, Susanna Norton died. In 1828, the probate was called in by Elizabeth Wagner, widow (formerly Newbury), a niece and one of the residuary legatees named in a will of January, 1820, and she was admitted a pauper. (a) Now when there had been an acquiescence in a probate for so many years, it was an extreme hardship upon the executrix to be liable to be called upon to substantiate, by proof, the will under which she had so long acted, and that, too, at the instance of a pauper, and where, more especially, no reasonable account was given for the delay. The result of the evidence before me renders this hardship still greater, because it is proved that Samuel Newbury is the real opponent: he applied to all the witnesses, and yet has received his legacy of 500*l.* under this very will. It would not, therefore, have been convenient for him to have contested this will, because he could not have opposed it without bringing in his legacy, and he would have been responsible for costs: but a pauper sister is put forward, that there is little chance for the executrix, after being harassed with this suit, to get reimbursed the expenses. (b) After such a course of proceeding every presumption would be in favour of the will that had been acted upon; but, in this case, the proofs are perfectly clear and satisfactory.

The deceased, as I have said, was a widow; and she had lost an only daughter. At Walworth, where she resided, she was acquainted with a gentleman of the name of Whitaker; he became her intimate friend and assisted her in the management of her affairs. In January, 1820, she employed Mr. Whitaker to get a will drawn for her; he took her instructions in writing; he carried them to his solicitor, Mr. Lilley, who having prepared the draft of a will, brought it to the deceased (whom he had never seen before), settled it with her, transcribed it, and it was executed and attested. By that will the more considerable benefit was given to the Nortons; the same weekly provision was made for Edward and John Newbury; 1000*l.* was given to Samuel Newbury, and the residue was distributed among the five nephews and nieces of that name. Samuel Newbury, who had kept a public house, but had come to reside with the deceased and to manage her household concerns, was, besides his legacy of 1000*l.*, appointed a joint executor with Whitaker; but it appears that he soon lost her confidence, for in Sep-

(a) See "in the goods of Ann Jones," vol. i. 81. [3 Eng. Eccl. Rep. p. 36.]

(b) On the admissibility of a responsive allegation given in on the part of Mrs. Mears, the Court threw out, in reference to the great hardship of this case, whether it ought not (at least before Mrs. Wagner was admitted a pauper to institute this suit) to have required an affidavit accounting for her not having sooner proceeded to call in the probate, and stating her belief that she should be able to set aside the will; more especially when she had been a party to a deed by which she had recognized its validity.

tember, in that year, the deceased sent for Mr. Lilley, and by a codicil revoked the appointment of Samuel Newbury as an executor, and substituted her niece, Sarah Norton.

To the validity and fairness of these testamentary acts the Newbury family cannot object; they, indeed, rely upon them. Both sets of relations were in habits of intercourse with the deceased, except the nieces of the Newbury branch; but the Misses Norton and Samuel Newbury were not on good terms. In June, 1821, Mr. Whitaker died; he was buried on the 15th of that month; and soon after that occurrence the will and codicil prepared by Lilley, in which Whitaker was an executor, were delivered into the deceased's possession. These facts are not in controversy between the parties.

Mr. Whitaker being dead, it was not improbable that the deceased would set about some fresh testamentary arrangement, and Lilley, not being her solicitor, having never seen her but at the execution of her will and codicil, having never transacted for her any other business, and she having solicitors of her own, Sweet, Stokes, and Carr, whom she had employed for sixteen years, it was natural that she should resort to these, her own solicitors, for the purpose of altering her will. Mrs. Mears called upon Mr. Sweet to request he would attend the deceased; and if she took the former will off the mantle piece to carry it with her, that conduct was, I think, in no degree suspicious. Mr. Sweet, on the second article of the responsive allegation, thus deposes:—

“On the 21st of July, 1821, Sarah Mears and Susanna Norton called upon the deponent at his office with a message from the deceased, stating, that she was very ill and wished him to attend upon her to make her will; and they made an appointment with the deponent to be at the deceased's house, Walworth, on the next Monday for that purpose: they informed him that Mr. Samuel Newbury (whom the deponent knew as a nephew of the deceased) would be acquainted that the deponent had been sent for, for the purpose of making the deceased's will. On the appointed Monday the deponent went to the deceased's house taking with him one of his clerks: the deponent found there Samuel Newbury and Sarah Mears. On being shown into the deceased's bed room (for she was confined to her bed) and being left alone with her she proceeded to give instructions for her will, and the deponent read each bequest to her as he wrote it down and so proceeded until the will was complete: it occupied the deponent about two hours altogether, the deponent made no draft of the will but wrote it out at once fit for execution. In the course of the preparation of the will the deponent wished to be informed as to the amount of the deceased's property, and she referred him to Samuel Newbury and Sarah Mears, and the deponent obtained the information he wanted from them and communicated it to the deceased; but she could not then determine as to the mode in which she would dispose of the residue of her property, and the deponent therefore concluded the will by stating, that the deceased had not made up her mind as to the mode in which she would dispose of it.”

There was, then, no clandestinity in the preparation of this will of June 1821, for Samuel Newbury was present and privy to it. The disposition of the property is the same as in the will of 1820, except that the legacy to Samuel Newbury is reduced from 1000*l.* to 500*l.*, and the residue is reserved to be afterwards disposed of. The two nieces, the Nortons, are in this will named executors; it was executed five months

before the death of the testatrix; and at that time there is not the least reason to doubt her capacity, or to suggest any influence or imposition.

The deceased was rather far advanced in years; she was about sixty-five, and confined to her bed with a painful disorder,—one that rendered moving extremely troublesome, and she grew gradually weaker in body; but, unless the whole account of making this will is a fabrication, and the attesting witnesses are most grossly perjured, her testamentary capacity in no degree failed; and the Court can entertain no doubt of its decision.

As I have mentioned, the deceased resided at Walworth; her two nieces on the Middlesex side of the town: they were her favorite relations; she was confined to her bed, at a distance from them, and with only a young girl and a hired nurse to take care of her. She had no inducement to remain in the neighbourhood of Walworth; Mr. Whitaker was dead, and her nephew, Samuel, could not perform for her those offices which she required, and were only proper for a female attendant to discharge. These considerations quite account for the wish and anxiety of the nieces to receive the deceased into their house, and make it natural that all parties should become desirous of her removal; and it is not unworthy of remark, that upon the occasion of her removal from Walworth, Samuel Newbury carried the deceased down to the coach. The residue by the will of July having been reserved for a future disposition, Mr. Sweet attended the deceased at Miss Norton's house in Charlotte Street, Fitzroy Square: upon that occasion he received from her instructions for a new will; he remained with her a considerable time, while she gave him the necessary directions; he was extremely cautious and particular throughout; and the minute detail of what passed at that interview leaves no doubt in my mind of the volition and capacity of the testatrix: and unless the facts, to which Mr. Sweet has deposed, are entirely fabricated, there is all the necessary proof furnished of the early part of this transaction; and the sequel is taken up and fully established by his partner, Mr. Carr: and the whole of the evidence on this part of the case is corroborated by Hardwicke, a clerk in their house, who was present during the whole of the transaction.

Now against the full and satisfactory evidence of the instructions for, and execution of this will, and the capacity of the deceased, what is there opposed? Why three or four old nurses, a young servant-girl, and two great-nephews, who give an opinion that the deceased was childish and incapable; their evidence, however, is extremely loose, and their recollection of facts, after seven years, not to be relied upon: and they depose against, and in contradiction of the whole conduct of Samuel Newbury, the very person who has brought them forward as witnesses, who was present at the whole business, whose legacy was reduced from 1000*l.* to 500*l.*, and who, therefore, if actual incapacity, fraud, and circumvention existed, was fully aware of all that occurred, and had every inducement to bring the matter forward;—and yet he acquiesced.

It is indeed to be regretted that he is not the party, and that his legacy has been paid, otherwise the Court might have had it in its power to do more ample justice to the executrix: but all the justice the Court can at present do is to pronounce for the will, and in order to mark that the proceedings are altogether vexatious, to condemn the party, who has

called in the probate, in costs; and should she succeed to any property the decree may then be enforced: but while she continues a pauper I shall direct the taxation to be suspended. (a)

(a) See *Filewood v. Cousens*, 1 Add. 286. *Le Mann v. Bonsal*, ib. 399. [2 Eng. Eccl. Rep. 121, 152.]

CRISP and RYDER v. WALPOLE.—p. 531.

A codicil produced under mysterious circumstances eighteen months after the deceased's death—there being no evidence of finding nor of any thing directly connecting it with the deceased—cannot be established on evidence of hand-writing alone, particularly when such evidence is conflicting, and when other circumstances raise a suspicion of the genuineness of the instrument.

THIS was a cause of proving in solemn form of law a codicil to the last will and testament of William Henry Robinson, late of Denston Hall, Suffolk, promoted by John Crisp and Thomas Ryder, the principal legatees therein named, against the executors of his will. The deceased died on the 12th of November, 1826, and in December following his will (dated on the 6th of December, 1822,) and nine codicils were proved. By his will the testator gave certain pecuniary and specific legacies, (amounting [in the whole to £1125,]) to several of his friends and servants named in the first codicil. The paper now propounded was alleged to be a further codicil: it was as follows:—

“Denston Hall, September 2, 1823.

“I give and bequeath unto Mr. John Crisp of Denston, Suffolk, the sum of sixteen hundred pounds. I also wish to give to Amy Crisp the sum of two hundred pounds. And I give to Mr. Ryder Charter House London the sum of six hundred pounds. I wish to give to Mrs. Territt Chilton Hall Clare two hundred pounds. I also wish to give to my curate Mr. Seabroke and R. Forbes gardener one hundred pounds each. My will and meaning is that this codicil be adjudged to be a part of my last will and testament.

“W. H. ROBINSON.”

This paper was propounded (as a codicil in the hand-writing of the deceased) in an allegation of fourteen articles: the fifth of which pleaded: —“That on the 19th of May, 1828, a letter packet sent through the twopenny post-office was delivered to Thomas Ryder, having the post-mark Newgate Street thereon, sealed with a wafer and addressed — Ryder, Esq., Charter House: that the said letter, or packet, consisted of the cover or envelope so addressed and the paper writing being the codicil propounded: that advertisements had been inserted in several newspapers, and printed hand-bills circulated at Denston offering a reward for the discovery of the person who put the letter or packet into the post, but that no discovery relating thereto had been made.”

Phillimore and *Dodson* in support of the codicil.

The *King's Advocate* and *Lushington* contra, were stopped by the Court.

JUDGMENT.

SIR JOHN NICHOLL.

This case lies in a narrow compass; for unless the principles established in these Courts for the security of property are broken through, I can entertain no doubt what decision ought to be given.

William Henry Robinson, the testator, died on the 12th of November, 1826; his will is dated 1822, and he left several codicils of different dates from 1823 to 1826 inclusive. In the month of December, 1826, the three executors, viz. the two Misses Walpole and Miss Jefferson took probate of his will and nine codicils: no other codicil was heard of, nor suggested to have been in existence at that time, nor until May, 1828, when Mr. Ryder received by the twopenny post—in a blank envelope—a paper purporting to be a codicil in the hand-writing of the deceased: this paper is dated, September the 2d, 1823; it gives various legacies, and among others, 1600*l.* to Mr. Crisp, and 600*l.* to Mr. Ryder—the two persons who have since propounded the instrument in this cause. Where this alleged codicil came from, or who sent it, has never been discovered. Mr. Ryder took all proper steps to trace its history, but without success. There rests not the least imputation or suspicion upon Mr. Ryder that he fabricated the instrument, or was in any manner privy to its concealment or to its production. No imputation whatever rests upon him.

But notwithstanding no discovery has been made accounting for this instrument not appearing till a year and a half after the testator's death, these two legatees, Mr. Crisp and Mr. Ryder, have called upon the executors to take probate of it; and have propounded and undertaken to prove it as a codicil. And the true question in the cause is, whether there be proof that the instrument is a genuine codicil—the act of the deceased. To this paper there is no attesting witness; the *factum* depends upon evidence of hand-writing alone; and there is no circumstance that connects the instrument directly with the deceased. Some general regard for the several legatees has been relied upon, as rendering the disposition probable. Now, in the first place, no person would set about the fabrication of an instrument without endeavouring to give the disposition some colour of probability: but looking to all the circumstances in which the deceased stood with reference to these parties at the date of this instrument, it does not appear to my mind even probable that he would have bequeathed these two legacies to Mr. Crisp and Mr. Ryder.

Declarations have also been relied upon; but they are loose and general, not referring specifically to this instrument; and they were made in 1826, when the deceased was residing at Brook House—a lunatic asylum—and labouring under a morbid depression of spirits. The proof, then, seems to rest on evidence of the hand-writing.

It is a rule of this Court that evidence of handwriting alone is not sufficient to establish a testamentary paper, without something to connect the act with the deceased: (a) and this rule is founded upon the facility there is of imitating handwriting so closely as to deceive those who are best acquainted with that of the supposed testator. It is therefore required that there shall be something to connect the instrument with the deceased,—either that it was found in his repositories at his death, or

(a) See *Constable v. Steibel and Emmanuel*, Vol. I. 60. [3 Eng. Eccl. Rep. 26.]

some direct recognition of it in his lifetime, or else some other circumstances of such strong probability that it was the genuine act of the deceased, as to leave no reasonable doubt on the moral conviction of the Court.

In the present case the evidence of the similitude of handwriting, even produced by the parties setting up the paper, is not uniform in support of it, while it is opposed by the evidence of other individuals who believe it not to be the handwriting of the deceased: so that this proof, at best of a loose and unsatisfactory species, is in the present instance conflicting.

There are other circumstances unfavourable to the genuineness of the instrument: the day of the month is written *after* the name of the month, whereas it is proved to have been the habit of the deceased, almost universally observed by him, to write the day of the month *before* its name.

It was also the habit of the deceased to write his names of baptism at full length, and not by initials, to formal instruments, though not to common letters: but to this codicil there are only the initials of the christened names. These, however, are slight circumstances of suspicion, not very much to be relied upon.

But the great difficulty of the case arises from the mysterious appearance of this instrument a year and a half after the testator's death: nor is there any account from whom it came, or from whence it came, or where it was first discovered, or why it had lain so long concealed: no plausible conjecture can be formed in explanation; and this circumstance raises a strong suspicion that the instrument has been a fabrication of much more recent date than the death of the testator. In addition to this, the paper is dated at the head, "Denston Hall, September 2, 1823," which was the testator's usual place of residence. Now it is satisfactorily proved that the testator was not at Denston Hall at that time; but that he had left that place on the 28th of July, had come to town, staid there some time, had then proceeded to Cheltenham, and did not return to Denston till the end of September. That the deceased, therefore, should have formally headed this instrument at Denston Hall, he being for a considerable time absent from thence, is not probable, more especially as there are several other instruments before the Court dated at the place where they were written: but if this instrument were fabricated three or four years after its date, and after the death of the deceased, it is not extraordinary that the person who fabricated it should not have been aware of, or should not have recollected the absence of the testator from Denston Hall on the 2d of September, 1823; and thus have fallen into a mistake, and furnished this additional circumstance of suspicion.

Upon the whole, the judgment of the Court is, that there is a complete failure of proof of this instrument, as a codicil of the deceased testator: the Court is not called upon to pronounce that it is a fabrication; but, whether fabricated or not, I must repeat that I fully acquit Mr. Ryder of any participation in the transaction, and that I entertain no suspicion that he was concerned in, or privy to, the fabrication of the paper.

If, however, parties will set up and undertake to establish such a case by proof for the chance of benefit to themselves, they must also be content to do it at their own risk of paying the costs in case of failure. I must, therefore, not ~~only~~ pronounce against the codicil, but feel bound to condemn the parties, who have propounded it, in costs.

HARRISON v. STONE.—p. 537.

On Protest.

The Court of Probate does not admit parol evidence to shew an error in a testamentary paper, unless there be, 1st, some ambiguity on the face of the instrument: 2ndly, the means of obtaining clear and indisputable proof of the deceased's intention.

GEORGE HARRISON, late of the Herald's College, died on the 16th of April, 1821, possessed of considerable personal property. By his will, dated the 8th of April, 1821, and described in the concluding paragraph, as, "Instructions which the testator desires may be formed into his will, and until then, that they should be considered as his last will and testament;" he appointed his nephews, Daniel Charles Rogers Harrison, (the residuary legatee,) Samuel Harrison (since dead,) and Robert Stone, the husband of a great-niece, executors. They took probate on the 27th of April.

In the will was a bequest to Robert Stone in the manner and words following:—"Gives to Mr. Robert Stone all such money as shall be due to the testator at the time of his decease."^(a)

On the 30th of March, 1829, a decree issued, at the instance of Daniel Charles Rogers Harrison against Robert Stone, the other surviving executor, citing him to show cause "why the probate should not be revoked and declared null and void by reason of the omission in the will of the words 'from him' alleged to have been erroneously and incautiously erased; and to accept, in conjunction with Daniel Charles Rogers Harrison, a new probate, with the words 'from him' reinstated in, and made to form part and parcel of the will, or to show cause why probate in such form should not be granted to Mr. Harrison."

An appearance was given for Stone under protest, which alleged;—"That within two or three days after the deceased's death, the will was read over by Daniel Moore, of Lincoln's Inn, the solicitor who prepared it, (and also solicitor of D. C. R. Harrison,) in the presence of D. C. R. Harrison and others; that D. C. R. Harrison himself gave instructions for the probate of the will without any interference on the part of Stone. That on the 26th of April, eighteen days only after the preparation of the will, Moore made an affidavit, that he attended the deceased on the 8th of April, and then by his desire wrote instructions for his will, which having been read over to, approved and signed by, the deceased, remained in the deceased's possession till his death; that in writing the will deponent committed many clerical errors, and that many alterations were made by the deceased's directions; that having now carefully inspected the will and particularly observed the several alterations, obliterations, and interlineations therein, (amongst others, the obliteration of '*me from him,*' and interlineations of '*the testator,*' and '*his*' in the bequest in favour of Robert Stone,) he saith the whole of such alterations, obliterations, and interlineations were made by him, by the deceased's directions, or with his knowledge and approbation, and previous to the execution of the will." That Stone was not until seve-

(a) The words in italics were substituted by interlineation. See the Judgment, *infra*, p. 208-9.

ral years afterwards aware of the existence of this affidavit; that on the 27th of April, probate issued to the three executors, and when completed, was sent to D. C. R. Harrison, by his directions, who took the sole management of the estate, and that Stone and Samuel Harrison did not interfere in the execution of the will except by joining in the acts of their co-executor for the sake of conformity and under his direction: that very shortly after probate was obtained, Stone claimed, under the will, all the money due to the deceased at his death, and that D. C. R. Harrison on such occasion said to him, 'I think you and I can settle it between ourselves, as it would be a pity that any part of the money should be spent in law;' that Stone had since frequently repeated the claim to Harrison, who on such occasions promised to arrange it, and that in consequence thereof Stone had delayed taking legal proceedings to recover the same, but that Harrison at length having refused to settle the matter, Stone filed a bill in Chancery on the 17th of May, 1827, to compel him; and the Master of the Rolls, on the 25th of February, 1829, decreed, 'that Stone was entitled to all debts and sums of money due to the deceased at his death.' It was further alleged, "that Harrison, very shortly after the deceased's death, knew of the alterations in the bequest to Stone, and who was entitled under the will, to all monies due to the deceased at his death: that Mr. Moore the preparer of the will, survived the deceased nearly seven years; and that, notwithstanding the premises, no proceedings were taken by Harrison to call in the probate, until nearly eight years after the deceased's, and upwards of a year after Moore's death; nor until after the decree of the Court of Chancery." The protest, in conclusion, submitted, "that under the circumstances alleged it was not now competent to call upon Stone according to the tenor of the decree."

In reply, it was alleged, "That on the 8th of April, 1821, the deceased, being exceedingly ill and confined to his bed, caused his solicitor, Moore, to attend him immediately: that on Moore's arrival in the morning of that day, the deceased requested him to take down instructions for his will; and Moore, accordingly, from the verbal directions of the deceased, in his presence, and the presence of Sir George Naylor (an intimate and confidential friend of the deceased,) wrote such instructions: that in the course, and as part of such instructions, the deceased said, 'I give to Mr. Stone all the money that he owes me,' meaning a sum of 1500*l.* due to him from Stone on mortgage with interest;—or, in words to that effect, signified his intentions by his will to remit such debt: that Moore immediately wrote down, 'gives to Stone all such money as shall be due to him from him at the time of my death;' but afterwards, in order to make the clause in the third person, made the alteration appearing in such bequest entirely of his own accord, and without having received any directions or instructions to that effect from the deceased: that after the entire instructions had been reduced into writing, and the alterations made, the will was read over to the deceased, and duly executed by him: that the alteration made by Moore in Stone's bequest, was made without the knowledge, and contrary to the meaning and intention, of the deceased, who never knowingly approved thereof, but remained in ignorance of the effect to the time of his death, and that the deceased never intimated an intention to benefit Stone, beyond forgiving him his debt: that the will was not otherwise read over to the deceased, nor was his intention directed to the alteration, and

that it was never read over by him: that in the course of the 8th of April, 1821, the deceased observed to Sir George Naylor, 'that he thought he had done enough for Stone by forgiving him his debts:' that about two days after the making of the will, the same was locked up by Sir George Naylor in a drawer in the deceased's bed chamber, which remained sealed up to the deceased's death." It was admitted, that Harrison took possession of the will, but not to the exclusion of the other executors: and it was averred, that the affidavit of Moore was not made at the instigation or procurement of Harrison, who did not interfere therein; and that Stone was not ignorant of such affidavit for several years. It was also admitted that Harrison took the sole management of the estate; but denied, that Stone claimed to be entitled to all the money due to the deceased, either shortly after the probate or at any time except as afterwards admitted, or that Harrison ever made the declaration, 'that they could settle it,' &c. or that he ever promised to arrange Stone's claims, or that Stone delayed taking proceedings as alleged in the protest; for that Harrison (it being the belief of all the executors that Stone took no benefit beyond the extinguishment of his own debt,) with the privity and concurrence of his co-executors, got in and received all monies due to the deceased at his death, except the debt from Stone, and applied the same for his own use, without any interference or objection by Stone; that, in June, 1821, Harrison, with the privity of Stone, made up the executorship account and paid the legacy duty on the residue in which were included the monies due to the deceased at his death. It was admitted, that about four years ago Stone observed to Harrison, 'that he must have some conversation with him relative to the bequest;' and that, on the 2d of February, 1827, Stone, in a letter to him, intimated, 'that he must have some conversation with him on the subject;' but it was denied, that Stone otherwise ever made any claim under the will beyond his own debt, and that he never made any direct claim to the monies due to the deceased, until the 22d of February, 1827, when he wrote a letter claiming 4,575*l.* as due to the deceased at his death; to which letter Harrison replied, expressing his surprise at the advancement of such a claim, and denying its validity."

It was then stated, "that the Master of the Rolls, in pronouncing in favour of the bill of complaint, declared in terms, 'that his decree was founded solely upon the bequest to Robert Stone, as it stood in that will of the deceased, of which probate had been granted, not admitting of any latitude of construction, and expressly referred to the Ecclesiastical Court as the proper jurisdiction for trying the question between the parties;' and submitted that the protest be overruled; that Stone be assigned to appear absolutely, and condemned in costs."

On behalf of Stone it was denied, "that the executorship accounts were made up, or the duty paid on the residue with his privity; but that on the contrary, they were rendered to the stamp office by Harrison entirely without Stone's knowledge, and were not furnished to him by Harrison until 1827. It was further denied, that the Master of the Rolls, in any manner, referred the question to the Ecclesiastical Court; and alleged that the decree does not contain any reference of that nature; but it was admitted, that the Master of the Rolls said, 'That if Harrison wished to impugn the bequest, he must go elsewhere, or to the Ecclesiastical Court for that purpose.' That in pursuance of the decree, proceedings were still depending in Chancery to carry the same into effect,

and that Harrison, by taking steps therein, had acquiesced in the decree."

The act on petition was supported by affidavits on one side and on the other.

Dodson, in support of the protest.

Where no ambiguity or absurdity is upon the face of the instrument, extrinsic evidence is not admissible; but where an ambiguity or absurdity manifestly exists and evidently results from error, there evidence, dehors the instrument itself, may be received: but before it can be admitted it must be clear and undoubted that the error was casual. *Bayldon v. Bayldon*, 3 Add. 232. [2 Eng. Eccl. Rep. 509.] In that case there was a manifest error in the enumeration of the nephews and nieces of the testator; it was clear, not only by the parol testimony, but from the instructions, that he intended, by this will, to have benefited another nephew. The error was apparent, and there was direct and unequivocal proof of intention. So in *Travers and Edgell v. Miller*, 3 Add. 226, [2 Eng. Eccl. Rep. 506.] folio 20 of the will was missing: the pages ran from 19 to 21; and, that a sheet was wanting, was proved by the context. There again it was clear that the omission must have been by mistake, and either not observed at the time the will was executed, or that the sheet had, since its execution, been accidentally detached: and the Court was enabled to supply its place by means of the draft will. But, on the other hand, in *Fawcett v. Jones*, 3 Phill. 434, 495. [1 Eng. Eccl. Rep. 432.] this Court refused to make a variation in Lady Bath's will, by inserting in it, from the instructions, a residuary clause; and the Court of Delegates affirmed the decree of the Prerogative Court. In the present case there is no ambiguity whatever; nothing that should induce the Court to resort to extrinsic evidence, and which can only be supplied from recollection, and by the conjectures of Sir George Naylor, who was present when the instrument was prepared,—eight years ago. No safe reliance could be placed on such testimony, even if admissible, when opposed by the conduct of the parties and the affidavit of Mr. Moore, the drawer of the will, made *recenti facto*. The Master of the Rolls did not advise these proceedings; if he had so done, he would in the mean time, have stayed the suit in his own Court: but even if a reference had been directed, it would not affect the principles which guide Courts of Probate in cases of this description.(a)

Lushington and Addams, contra.

If it be true, as is alleged, that the deceased never intended to benefit Stone beyond the extinguishment of his debt, the protest must be overruled whatever ultimately may come of the case; unless, indeed, something is set forth in support of the protest which is quite conclusive against the ability of the Court to afford relief. At present the Court is not apprized of all the evidence, but enough is disclosed to raise a strong probability of error. We admit, but with certain exceptions, that written instruments cannot be varied by parol evidence: the general rule, however, applies to instruments not regularly executed only, but to instruments regular and formal in themselves. Here the paper required, in the first instance, some extrinsic evidence to give it probate. The *factum* is informal; the deceased was aged and infirm, and placing great confidence in his solicitor, does not seem to have ad-

(a) See *Draper v. Hitch*, Vol. I. 678. [3 Eng. Eccl. Rep. 289.]

verted to the variations in the wording which had been introduced. But can it be successfully argued, that there is no ambiguity, on the face of the instrument, and in the construction of the bequest to Stone, arising from the words as altered, in comparison with those originally adopted? The variation is considerable, and introduces an important ambiguity and incongruity in the will. It is said, however, that the intentions of the testator cannot now be satisfactorily collected from the contents of Sir George Naylor's affidavit; but his intimacy with the deceased, the declarations subsequent to the execution of the instrument, and the peculiarity of the bequests, will sufficiently account for the accuracy of his memory upon the points in question. Mr. Moore's affidavit was made in the usual form to account for the alterations in the paper; but his particular attention was not directed to the effect of those alterations. In *Blackwood v. Damer*, cited 3 Phill. 459. [1 Eng. Eccl. Rep. 455.] 3 Add. 239. (n.) S. C. [2 Eng. Eccl. Rep. 512.] there was a clear omission by the attorney in not inserting a residuary clause: the draft was read over; it remained two days in the deceased's possession, and was executed; yet the Court of Delegates decreed that the residuary clause should form part of the will. *Fawcett v. Jones* has been relied upon; but there Lady Bath's attention was called, specially and repeatedly, to the residuary clause; and the will was most carefully prepared, and executed by a vigilant testatrix. If there was not a direct reference of this case, it was, in terms, sent by the Master of the Rolls for a decision in the Ecclesiastical Court. There has been no negligence nor acquiescence on the part of the residuary legatee.

JUDGMENT.

SIR JOHN NICHOLL.

George Harrison, Esq. died on the 16th of April, 1821; and, on the 27th of that month, probate of his will was taken, under 40,000*l.*, by Samuel Harrison, Daniel Charles Rogers (now Rogers Harrison) and Robert Stone, the executors. Daniel Charles Rogers was also residuary legatee. The will is dated on the 8th of April, 1821: it is not formally drawn up, but was intended as instructions, which for precaution, were executed and attested by three witnesses. One of the three witnesses was Daniel Moore, a solicitor, the writer of the instructions, who is since dead.

The instrument, being instructions, is for the most part expressed in the third person: it is headed,—“Instructions for the will of George Harrison, Esquire:

“He desires to give to his sister, Mary Page, widow, an annual sum of 200*l.* during her natural life; and, after her decease, he desires that the same annual sum be continued to her two sons.”

But the present question arises upon a clause, containing a bequest to Robert Stone, one of the executors, in these words:—

“Gives to Mr. Robert Stone all such money as shall be due
“to the testator at the time of his decease.”

There are other words which were erased, viz. “him” at the end of the first line; “me from him” at the beginning of the second line; but “me” is carried out to the left. These words are struck through. “My” also, between “of” and “decease” is struck through; and “his,” written over it. The probate, however, was taken as the clause stood

altered by the erasures; that is,—“Gives to Mr. Robert Stone all such money as shall be due to the testator at the time of his decease.”(a)

This probate remained till March 1829, when a decree calling it in issued, at the suit of one of the executors,—viz. the residuary legatee, and citing Robert Stone, the other surviving executor and the legatee under this clause, to show cause “why the former probate should not be revoked and a new probate granted with the words ‘from him’ inserted as having been erroneously and incautiously struck through.”

To this decree an appearance has been given under protest; and the matter comes on by act on petition and affidavits. Whether there was any necessity to appear under protest,—for there is no ground to object to the jurisdiction, no ground strictly amounting to any bar, if such circumstances should be stated as would clearly and safely establish error—need not be inquired into by the Court: but the real object is to ascertain, whether, upon the circumstances suggested, the Court can legally and securely allow the executor and residuary legatee now to go into proof, in order to show that the words, proposed to be reinstated, were “erroneously and incautiously” struck out without the knowledge and contrary to the intentions of the testator.

The instrument was executed by the deceased, and attested by the witnesses, with the words struck through: *prima facie*, then, whether the instrument was intended to have effect, or was only executed as a precautionary measure, yet still I must consider it as containing the final wishes of the testator. There have been instances where a clause, introduced by fraud, has been expunged; where a clause, omitted by error, has been supplied; but, in those cases, there has been the concurrence of two circumstances,—first, some ambiguity on the face of the executed instrument itself; and secondly, the means of obtaining clear and indisputable proof that the insertion or omission of the clause was contrary to the intention of the testator. These two things must concur before the Court can safely interpose. In the present case some intervening circumstances may be noticed. There is conflicting evidence as to the exact time when Stone first set up a claim to *all* the debts; but this is not very material, since it will not prove the intention of the testator; at all events the claim is admitted to have been set up four years ago, and, more expressly, in February 1827, in May of which year a bill in Chancery was actually filed by Stone against the residuary legatee. That bill went to a hearing; and in February 1829, the Master of the Rolls decided in favour of Stone’s application. Mr. Moore, the drawer of the will, died on the 6th of January 1828,—that is, after the bill was filed, and before the decision of the Master of the Rolls; so that it is not till after all these events,—the bill filed, the decree at the Rolls, and the death of the solicitor,—that the residuary legatee sets up, in this Court, this error in the will. The suit is instituted eight years after the testator’s death, and probate had been taken of his will.

The words, indeed, of the inquest are strong; “not admitting of any

(a) The clause, with the erasures and interlineations, stood thus:—

“Gives to Mr. Robert Stone all such money as shall be due to [him ^{me} from him]” the testator at the time of [my]” decease.”

* The words included in brackets [] were stricken through with a pen.

latitude of construction"—as expressed in the language of the act on petition.

What, however, is to be the clear and decisive proof of the unintentional erasure? Even the drawer of the instrument, Mr. Moore, is dead. His evidence, therefore,—the best parol evidence—cannot be obtained to show error; on the contrary, his testimony, as far as it can be obtained, exists in an affidavit,—produced at taking probate by the residuary legatee himself,—that the erasures were made by the directions of the deceased, and read over to him previous to the execution. And there are also Mr. Moore's own written document, and his conduct in obtaining the deceased's execution of it in its present state, both as to shape and contents. Now what is there to oppose to this, and to satisfy the judicial mind of the Court that the general terms, in which this bequest now stands, were not fully understood and approved of by the testator?

True it is, as has been argued, that the nature of the bequest is not very common; and, therefore the probability, upon conjecture, would be rather in favour of there being some error, especially as Stone himself was a debtor to the testator's estate for the sum of 1500*l*;(a) the release of which debt alone would have been considerable; and Sir George Naylor, in his affidavit, has expressed his belief and opinion that the deceased so intended the bequest.

Sir George Naylor states, that the deceased, in giving the instructions, said, "I give to Mr. Stone all the money that he owes me;" and no doubt he has fairly stated his impression: but declarations to be spoken to by a third party are so open to mistake and misapprehension as to be very liable to error. What a slight alteration would alter the whole sense and make the bequest conformable to the will as altered. "All that he owes me;" or, "all that is owing to me," are easily misapprehended, or misrecollected at the end of eight years. Here is no written document suggested to be forthcoming which can in any degree, lay a foundation for, and corroborate the existence of, any error. No fair copy, containing the words struck through, was engrossed for execution; no cotemporaneous evidence of that sort, on which the Court can rely, can be furnished. In *Blackwood against Damer*, 3 Phill. 459. 485. [1 Eccl. Rep. 455.], the Court had evidence of that description: but still what it most relied upon were the written instructions. So again, in *Bayldon against Bayldon*, 3 Add. 232. [2 Eng. Eccl. Rep. 509.], there were the instructions: the very draft of the will, in Baron Wood's own handwriting, had the names of the parties who were to be benefitted. But, upon mere parol declarations, without any thing in writing, after such a length of time, to hold that the words in the executed instrument were "erroneously and incautiously struck through;" and for the Court to reinstate them would be a most dangerous precedent. I, therefore, feel bound to dismiss Mr. Stone.

Protest sustained.

Upon Mr. Stone's costs being applied for, the Court observed;—that it was an important question, and declined to grant them.

(a) The debts, owing to the testator at the time of his death, amounted altogether to 3500*l*.

BIRD v. BIRD.—p. 553.

On Taxation of Costs.

The costs of exceptive allegations tendered on both sides (the admission whereof was suspended till the final hearing, and then not prayed to be received), not allowed to be taxed against a party condemned in costs.

In the Goods of JOSEPH KNIGHT.—p. 554.

(On Motion.)

Probate granted to a deed, testamentary in its whole purport and effect, and not to operate till after death.

IN 1819, Mr. and Mrs. Knight executed a deed conveying property to trustees for the use of the deceased and his wife; and, upon the death of the survivor, to pay over the property, in certain parts, to different persons. Mr. Knight survived his wife; and died, not having made any will, and without having exercised a power, reserved to him, of revoking the uses and trusts of the deed.

The King's Advocate,—after stating that the deed was in its whole purport and effect testamentary, and not to operate until after the death of Mr. Knight,—moved for probate of the instrument to be granted to the residuary legatees in trust named in the deed, as executors according to the tenor. (a)

Per Curiam.

Let the probate pass as prayed.

Motion granted.

(a) A Chancery Barrister had given an opinion, that the legacy duty attached on the benefits conveyed by this deed.

In the Goods of BENJAMIN CAMPBELL.—p. 555.

On Motion.

A will, in existence after the testator's death, being accidentally lost and the contents unknown, administration limited till the will be found granted (on justifying securities) to the widow alone, with a minor daughter, entitled in distribution.

THE deceased, late assistant surgeon of the medical staff at Maidstone, Kent, died there in January 1829; he left a widow and a minor daughter, the only persons entitled in distribution.

Some years prior to his death, he transmitted a sealed packet to Mr. Collyer, his agent in London, informing him that it contained his will, and requesting that he would take charge of it. On the 15th of January 1829, Collyer received a letter from the commanding officer of the depot at Maidstone, apprising him of Campbell's death, and enclosing a letter, addressed to "Mrs. Campbell, 164, Trongate, Glasgow," to be forwarded.

The letter and packet intrusted by the deceased to Mr. Collyer were, on the same day, put into the post-office in London, and reached Glasgow; but the letter carrier, not being able to find Mrs. Campbell, returned the letter and packet to the post-office. They were never afterwards traced. A diligent search was made at the post offices at Glasgow, Edinburgh, and London; and various advertisements inserted in the newspapers in respect to the lost packet, but no information was obtained. The deceased's papers were searched, and no draft nor copy of the will could be discovered. Upon affidavit to the above effect, *Phillimore* moved for letters of administration to be granted to Margaret Campbell, widow of the deceased, limited until the original will should be found and brought into the registry.

The property was in the funds, and under 1200*l*.

Per Curiam.

The affidavit of Mr. Collyer shows that the will was in existence after the death of the testator; and there is no reason to conjecture that it is suppressed. I shall grant the administration to the widow, limited till the original will be found; but I direct the securities to justify.

Motion granted.

ROXBURGH v. LAMBERT.—p. 557.

On Motion.

The Court grants administration to a bond-creditor, who has also a mortgage on leasehold property.

WILLIAM LAMBERT, a carpenter, died in 1827. He left a widow and one child. On the 29th of June, 1829, a decree issued against the widow and child, why administration should not be granted to Francis Roxburgh, a creditor by bond. After the decree had been served, it was ascertained that the demands of the creditor were secured by mortgage on certain leasehold property; and it was suggested in the registry that the security by mortgage might disqualify him from taking administration as a creditor.

Curteis moved for the administration.

Per Curiam.

There is no difficulty in allowing this administration to pass. A bond creditor has a lien even on freeholds, yet the Court grants administration to a bond creditor. Here the mortgage is on leasehold property, which is subject to simple contract debts, and to the claims of creditors generally; and the bond is to be regarded as a collateral security to the mortgage. If the grant were prayed by a mortgagee of real property, there might be a reason why the administration should not pass to him, because it would give him a priority, and exclude simple contract creditors. In this case I decree the administration.

Motion granted.

92. 211, LE BRETON v. FLETCHER.—p. 558. 1 Ann. 400. 217, 7.

A will may be pronounced for, though both the attesting witnesses depose to the deceased's incapacity.

Phillimore, in support of the will.

2 E.C.R. 289.

Lushington contra.

JUDGMENT.

Sir JOHN NICHOLL.

The deceased, Mary Anne Fletcher, a married woman, died on the 19th of April, in the present year; and the will propounded is made under a power, reserved in her marriage settlement, enabling her to dispose of certain property by a will attested by two witnesses. The will in question is dated on the 18th of April, 1829, the day preceding her death; it is propounded by one of the residuary legatees, and opposed by the husband of the deceased. The plea, propounding the instrument, sets forth, in the first article, the power under the settlement, but is, in other respects, a common *condidit*. This is the only plea in the cause, so that the husband has produced no witnesses, but contented himself with administering interrogatories. Three witnesses have been examined by the residuary legatee;—Sir Thomas Harvie Farquhar, the executor who has renounced: Sarah Nixon, and Mary Turner, (servants in the family,) the two attesting witnesses.

The case depends much on the credit of the witnesses. Sir Thomas Farquhar, who was the deceased's banker, and one of the trustees under her marriage settlement, and also an executor of a former will, gives a full and detailed account of instructions on the 17th of April: for the codicil, written by him in pencil on that day, and signed by the deceased, is, in substance, the same disposition as the will now propounded, which is to give effect to the intentions there expressed; there is a mere alteration in form but no deviation in substance.

It appears from Sir Thomas Farquhar's evidence, that he showed this codicil to his confidential clerk, who had prepared the deceased's former will, and that they considered a new will would be more convenient than a codicil. His evidence further states,—the preparation of the present will with blanks for some of the legacies, his attending the deceased on the 18th, explaining to her the state of her property, her approbation of the will and directions for filling up the blanks, the reading over, final approbation, the calling in of Nixon and Turner as witnesses, the execution of the will by the deceased, and the subsequent attestation of the two female witnesses. Unless, therefore, the whole of this account is gross perjury, there can be no doubt of volition and capacity: and the will, I repeat, is in substance and effect the same as the pencil codicil.

The two female servants venture to swear that the deceased was in a state of incapacity: they were, it must be remembered, merely present at the execution; they have deposed against their own act, and what is more important (coupled with the general tone of their evidence), they are still in the service of the husband. They have described him as a most affectionate husband, and that the deceased always spoke of him as such.

From the evidence of Sir Thomas Farquhar, who would hardly have

deposed to it, if not true, the husband had dissipated the greater part of the deceased's fortune, and, according to his account, she spoke of him very differently from what is stated by these women servants. (a) Again, Sir Thomas Farquhar deposes, that, on the 18th, he brought with him the whole of the deceased's balance; she said she would take 60*l.* and signed a draft for that sum. 50*l.* she put under her pillow for the use of her husband, and the remaining 10*l.* she gave to Miss Le Bretón for the use of the house. This account then, if untrue, might be most easily contradicted; and, if true, it shows capacity, and falsifies and totally destroys the evidence of the two servants.

Upon the whole I am of opinion, that the truth of the case is, as represented by Sir Thomas Farquhar; and that the two witnesses, who, without offering the least objection, attested the will, have not given a correct account of the state of the deceased at the time she executed it, and I therefore pronounce for the will.

(a) Under the marriage settlement the husband received 2000*l.* on the day of marriage; and, by the will propounded, the deceased left him all her furniture and other effects in the house in which she was residing; but not her plate and trinkets, which were in the care of Herries, Farquhar and Co., and she directed her executor to pay all her funeral expenses, and such debts and tradesmen's bills as he might be satisfied had been incurred for her sole and separate use.

JOHNSON v. WELLS.—p. 561.

A second marriage and the birth of issue is not a revocation of a will made in favour of the children of a former marriage and an illegitimate child, where the second wife has some real property settled on her issue under her father's will, and where the deceased had possession and full knowledge of the existence of such will.

THIS was a cause of proving in solemn form of law the will of Jacob Wells: and the question was, whether, under the circumstances, marriage and the birth of a child was a revocation of a will made (during widowhood) in favour of the issue of the testator's first marriage, and also of an illegitimate child.

The King's Advocate and *Phillimore* for the executor.

The presumption of law, by which it has been held that marriage and the birth of issue induce a revocation of a will previously executed, does not apply to this case. The widow has a fund at her own disposal, which, considering the deceased's property and the state of his family, is a fair provision for herself and child. Talbot and Talbot is decisive of this case, Vol. I. p. 705. [3 Eng. Eccl. Rep. 299.] If an intestacy be pronounced for, an illegitimate daughter, for whom the deceased entertained the strongest affection to the hour of his death, will be left—contrary to the clear and manifest intentions of the testator—wholly destitute.

Addams and *Haggard* for the widow.

The deceased frequently declared that his wife should have all her own fortune, and that he would provide for the child by his second marriage: but he died without completing these intentions. The evidence also clearly proves that, in consequence of his second marriage and the birth of issue, he intended to alter his will: the presumption of law, therefore, that the will is revoked, is sustained rather than re-

butted. In *Talbot v. Talbot*, there was a marriage settlement, and the child was provided for; here, if the will is established, the son born of the second marriage is liable to be left wholly without a provision; while, in case of an intestacy, the interests of all parties will be secured, except of the natural daughter, and she will have an equitable claim on the widow and children.

JUDGMENT.

Sir JOHN NICHOLL.

This case is so clear that the Court cannot entertain a doubt upon it. The deceased, Jacob Wells, died on the 24th of November, 1828: he left a widow, a daughter, and two sons by a former marriage; and one son by the latter marriage. The children are all minors; and the daughter is illegitimate, being born a few months before Mr. Wells' marriage with his first wife. At his death he was possessed of property amounting to about 6,500*l.*: there was also a sum of 2,150*l.* 3 per cents. standing in the joint names of the deceased and his second wife; and a real estate, about 600*l.* in value, secured, under her father's will, to her and to her issue.

In 1816, the deceased, then a widower, executed a will, leaving his fortune equally between his then three children, including the daughter before marriage; and appointing Edward Wells his brother, and Johnson, his brother-in-law, executors. In May, 1825, he married a second wife, Mary Rutter, who under her father's will was entitled to two or three thousand pounds, (the precise amount is not material to the decision of this case,) left to her separate use. Previous to her marriage a settlement was intended, but, before it was fully drawn up, the marriage took place; however, immediately after the marriage, stock in the 3 per cents., to the amount I have already stated, was invested in their joint names. She is now entitled to that stock, and to the little freehold estate for her life, making together from 2 to 3000*l.* Of this marriage a child was born, who survived the deceased, and who is not two years old.

The question, then, is, whether, under these circumstances, the marriage and birth of a child revoked the will of 1816. It is not suggested that the deceased was unacquainted with the existence of that will: the whole case, indeed, admits his knowledge of it: the will was in his possession, and he did not cancel it. Nor is it suggested that he intended to die intestate. The effect of an intestacy would be, that one-third would go to the wife, and the other two-thirds be divided equally between the two children of the former, and the child of the latter, marriage; while the whole of the wife's property would benefit exclusively her and her child; and his illegitimate daughter from whom his regard was not in any degree withdrawn, would be left wholly unprovided for.

The deceased talked of making a new will, and possibly might so have intended; but that will not vitiate the instrument propounded; and it is not inconsistent with the intention and with the belief that the existing will would operate, until he revoked it by making a new one. His conduct strengthens this view of the case; for, as I have mentioned, he was fully aware of the existence of the will; it was in his own house, and he preserved it till his death. The declarations, then, are little to be relied upon: they passed in general conversation, and may have been insincere: but the facts are much more material.

Marriage and issue is not an absolute revocation; it is only a presump-

tive or implied revocation, and the implication may be repelled by circumstances. It has been held in several cases, that the presumption does not arise where there are children of a first marriage, and there is a provision for the second wife and her issue. In *Kenebel v. Scrafton*, 2 East, 530, and in *Ex-parte Ilchester*, 7 Ves. jun. 348, the presumption was repelled.

Without, then, entering into a minute investigation of the principles on which these rules are founded, and which are fully laid down in several reported cases, the present case is this,—That the wife's fortune (whether precisely the whole or not is immaterial) is so placed as to form a provision for her and her child: the children of the first marriage will not partake of it. The widow will be exclusively entitled to the 3 per cent. stock, and to the enjoyment of the freehold.

Under these circumstances it seems to me quite clear, both upon principle and authority, that the will of 1814 is not by implication revoked. I accordingly pronounce for it, and decree probate to the executors; but, upon the whole, shall make no order as to costs.

CONSISTORY COURT OF LONDON.

The office of the Judge promoted by HOILE v. SCALES.—p. 566.

In a vestry-meeting for civil purposes, as a full latitude of discussion must be allowed, mere coarse expressions do not constitute "brawling;" but on proof of an act of "smiting," the Court is bound, whatever may be the origin of the dispute, to proceed to award punishment, under the 5 & 6 Edw. 6. c. 4. and 53 Geo. 3. c. 127.

A party pronounced excommunicate, sentenced to seven days' imprisonment, and condemned in costs.

WRIGHT v. ELLWOOD calling herself WRIGHT.—p. 598.

A citation, issuing as "in a suit of nullity of marriage by reason of a former marriage," will not found a sentence of separation "by reason of an undue publication of banns," the woman being therein described as spinster, the first husband having died subsequent to the publication of banns but prior to the marriage.

THIS was a suit of nullity of marriage, by reason of a former marriage, promoted by James Wright against Amelia Ellwood, in the citation described as "late wife and now widow of Harlow Ellwood, heretofore calling herself Emma Ellwood, spinster, and subsequently Emma, otherwise Emily, Wright, wife of James Wright." The libel was admitted without opposition; it pleaded, *inter alia*, that in 1825, Amelia Ellwood assumed the christian name of Emma, and called herself a spinster; that James Wright, believing that she was a spinster, paid his addresses to her and caused banns of marriage to be published by the name of Emma Ellwood, spinster, that banns were accordingly published on the 28th of May, the 4th and 11th of June 1826; that Harlow Ellwood, her husband, died on the 27th of June, 1826, and that her marriage with Wright took place on the 6th of July following. It further pleaded, the 4 Geo. 4. c. 76. s. 22. and that, at the publication of

the banns, Harlow Ellwood was alive; that Wright and the party cited cohabited till September 1828, when the complainant discovered he had been imposed upon. The libel concluded with a prayer that the marriage, *de facto*, might be pronounced null and void. The prayer was not made on any stated ground. Upon the evidence taken upon this libel, the cause now came on for hearing.

The King's Advocate and *Phillimore* for Mr. Wright.

Addams contra.

JUDGMENT.

DR. LUSHINGTON.

This case offers many difficulties and objections, but it appears to me that, upon the face of the proceedings, there is one fatal objection to the sentence prayed. The citation describes the cause as a suit of nullity of marriage by reason of a former marriage; but the sentence, which the Court is asked to pronounce, is a sentence of nullity by reason of an undue publication of banns. There is then a discordance between the citation and sentence prayed. This variance is fatal. The proceedings commenced in the same form of citation as if the husband of the first marriage had been alive when this marriage was solemnized. But what was the fact? It appeared, that though the party proceeded against was a married woman at the time the banns were published, she was a widow, and therefore might legally contract marriage, at the period when this marriage was actually celebrated. It is impossible, then, whatever might be the inclination of the Court, that it could pronounce this marriage void by reason of the former marriage. If this marriage, upon the evidence before me, was illegal, it must be pronounced so on the ground that the party proceeded against was improperly described in the banns; but with the irregularity, to which I have been adverting, apparent on the face of the proceedings, I do not think myself justified in pronouncing this marriage void. It is not, therefore, necessary for me to offer any opinion upon many other objections, nor state the difficulties that I entertain in respect to many parts of this case.

In suits of nullity the Court is bound to act with peculiar caution lest the legitimacy of children may improperly be brought into question. Here there are no children, and consequently the rights of issue cannot in this instance, be affected: but suppose there had been children, they would have had an interest in upholding this marriage, and might have been prevented by the character of the proceedings. They might have declined to interfere by the cause appearing to be a cause of nullity by reason of a former marriage, and not by reason of undue publication of banns. But the Court must also bear in mind that there may be other parties who may be interested in a suit of this description. I am then of opinion, that, if I were to pronounce this marriage void, I should introduce a laxity of practice that would be extremely detrimental. I, therefore, must decline to sign the sentence that is proposed; and I dismiss the party cited from all further observance of justice in this cause.

MACLEAN v. MACLEAN.—p. 601.

On Admission of an Exceptive Allegation.

The Court will not admit an exceptive plea that an indictment of witnesses, for perjury in their depositions in the cause pending, has been preferred and a true bill found, nor delay the hearing till the indictment is tried.

THIS was a cause of restitution of conjugal rights brought by the wife against the husband, in which a responsive allegation charging the wife with adultery had been admitted without opposition. Nine witnesses were examined in support of this plea; and, upon the publication of their evidence, an allegation of seven articles, exceptive to the testimony of Catherine Hughes, and another witness, was offered upon the part of the wife. This exceptive allegation, after pleading in contradiction to the deposition of Catherine Hughes upon the responsive allegation, set forth in the fifth article:—"That at the Sessions for the city of London held at the Old Bailey on the 4th of December 1828, Mrs. Maclean preferred a bill of indictment against Catherine Hughes charging her with having committed wilful and corrupt perjury in her deposition given in this cause, and that a true bill was thereupon found against her by the Grand Jury, which, by a writ of certiorari, had been removed into the Court of King's Bench."

Phillimore and *Dodson* for the husband.

The King's Advocate and *Nichall* contra.

JUDGMENT.

DR. LUSHINGTON.

In order to form a correct opinion of the admissibility of this exceptive allegation, it is necessary to consider the nature of the cause and the steps that have been taken in it.

The commencement of these proceedings was a citation served, at the instance of Mrs. Maclean, upon her husband in a suit for restitution of conjugal rights. This application was met by the husband who charged his wife with adultery, and, in an allegation responsive to her libel, detailed the grounds of his accusation. Upon the admission of that allegation, Mrs. Maclean knew the nature of the charges against which it was necessary to defend herself; she knew that she was charged with receiving, in her husband's absence, clandestine visits from Dominic Oliveira, and that he remained with her alone from an hour to an hour and a half at each visit. Mrs. Maclean, however, left her case to the defects, if any; of her husband's plea, offering no exculpatory allegation, and making no attempt whatever to contradict the misconduct imputed to her, till after the publication of the evidence. If it had been Mrs. Maclean's intention to have examined Mr. Oliveira (the alleged paramour, and upon whose testimony almost exclusively this exceptive plea, if allowed to go to proof, is avowedly to be sustained,) she should have done that upon an allegation specifically denying the husband's charges.

It is not necessary to advert to the general principles which guide the Ecclesiastical Courts in pleas of this sort; but it is well established, that, to entitle them to admission, "*falsitas cum corruptione*" must be alleged; and it must also be set forth, to the satisfaction of the Court, that the matters, upon which the witnesses are to be contradicted, are

material to the general issue. Although sometimes it may be essential to justice to try collateral issues in a cause, yet it is the duty of a Court to avoid them unless the necessity is extremely clear. Is it then absolutely necessary for the purposes of justice that this plea should be admitted? The Court will not disregard the observation, that the whole expense of these proceedings falls upon the husband; but that remark must give way to higher considerations; it is a burden incidental to the marriage state.

It is alleged that Catherine Hughes has deposed falsely in respect to a declaration: but the declaration is immaterial to the issue; and if the plea, on this point, should be fully established, it would not prove the witness guilty of wilful and corrupt perjury. It resolves itself into a mistake and error—not sufficiently stringent to be of importance. I admit that the principle, as to contradictory evidence of particular facts upon a general plea, is truly stated; but at the same time, if pleas were to be extended so as to include all particular facts, it would lead to an inconvenient and oppressive length: it is sufficient that they should furnish enough to open the means of defence. Here no plea in exculpation was given by the wife prior to publication; yet she now alleges that she has not committed adultery. This is a direct averment which should have been brought forward in an earlier stage of these proceedings, and is not now entitled to be received.

The chief matter for consideration is the fifth article; it is there pleaded that a true bill has been found against Catherine Hughes for perjury in this case. This averment, according to my present recollection, is novel: I am not aware of any precedent upon the point. If I were to admit it, to what sort of weight would the proof be entitled? It has been truly observed, that the bill was found on *ex-parte* evidence, without any opportunity of contradiction; and that the mere finding of such a bill was not sufficient to extinguish the credit of a witness. But it was suggested that the hearing of this cause should be deferred till after the indictment had been tried. If the Court were to yield in this instance, the same means of delay might be resorted to in every cause. It would be desirable, for the purpose of considering this matter, to ascertain on whose testimony the bill was found. If on the evidence of Mrs. Maclean herself, it would enable her to be a witness in her own cause. In *Thurtell v. Beaumont*, 1 Bingh. 339, a verdict had been given for the plaintiff to the amount of certain goods sworn by his brother to have been on the premises at the time they were burnt down. A new trial was afterwards moved for, supported by an affidavit from the defendant, that true bills had been found against the plaintiff's brother and others for a conspiracy to defraud the fire office in this very matter: when Park, J. said—"I find many applications for new trials on the ground of bills found by the grand jury, but none in which the application has succeeded. In one case, where the ground of the motion was, that a bill for perjury had been found against the principal witnesses, Lord Mansfield said, that, the granting the rule for such a reason would have a most dangerous tendency, as it would open a door for constant scenes of perjury, and tempt a person to delay execution by indicting his adversary's witnesses. In *Warwick v. Bruce*, (4 M. & S. 140.) Lord Ellenborough discharged with costs, a rule to stay execution till after the trial of an indictment against the plaintiff's witnesses for perjury; and in *Bartlett v. Pickersgill*, (4 East, 577. n.) in Lord Henley's time, a

plaintiff having petitioned for leave to file a supplemental bill, because the defendant had, on the evidence of the plaintiff, been indicted and convicted for perjury on his answer to the original bill, Lord Henley dismissed the petition." Another case was referred to by Dallas, C. J. in support of the same principle, and the application was refused.

How, then, do these cases apply to the present? That if the finding a true bill, or the conviction of a witness, be no ground, at common law for a new trial, nor, in equity, for a supplemental bill, they cannot avail to the postponement of the hearing of a cause depending in these Courts. I do not say that a plea, alleging the conviction of a witness of perjury, would in no case be admissible; but the Court would require that the conviction should not have proceeded on the evidence of the party in the suit, or of the alleged *particeps criminis*. I reject the allegation.

Allegation rejected.

MORSE v. MORSE.—p. 608.

On Admission of the Libel.

A party cannot plead the contents of an instrument, unless it is destroyed or in the possession of the adverse party.

The Court will not depart from its regular practice, by directing a list of witnesses to be delivered, some time anterior to their production, to the other party residing voluntarily in France.

THIS was a suit of separation, by reason of the cruelty and adultery of the husband. The thirty-first article of the libel pleaded, "that in 1822, 1823, and 1824, and more particularly on the days when any thing occurred to prevent his (the defendant) being much alone with A. W., he continually passed a considerable portion of his time in writing and sending *love* letters and notes of a very amatory description to, and receiving similar letters from her, &c.; such *love* letters and notes being generally conveyed between the parties by a little girl." (a) The letters were not annexed to the libel, nor was it pleaded that they were not in the possession or control of the wife. The admission of this article alone was opposed.

Per Curiam.

The attention of the Court is directed to the thirty-first article only; and the objection is, that it pleads a correspondence between the defendant and the party with whom he is charged to have committed adultery. The general character of that correspondence is set forth, but none of the letters are exhibited. The libel does not allege the letters to be in the husband's possession, nor that any one has seen them and is acquainted with their contents, though somebody, it may be presumed, would be examined to depose in support of the article.

It is, I apprehend, a settled rule, that a party cannot plead the contents of an instrument, unless it is destroyed, or in the possession of the adverse party. If the article had pleaded that the letters were in the husband's possession, or that any one had seen them, and could identify the handwriting, I should have allowed the description of the letters to

(a) The words in italics were directed to be struck out.

stand, and admitted the article. But, in the absence of all such averments, I must direct the article to be reformed, by striking out the epithets attached to the letters: and I am the more inclined to pursue this course, because, if it can be shown by the wife that her husband kept up a constant correspondence with this woman, she will have all the effect from that proof, that the article in its present shape could supply.

Libel reformed.

The libel being admitted, a motion, founded on an affidavit that the husband was in France, was this day made to the Court,—that it would direct a list of the witnesses, intended to be examined on the libel, to be given to his proctor, in order to enable him to communicate with his client upon the interrogatories. An affidavit, on the part of the wife, (who opposed the motion) was also before the Court.

Per Curiam.

This is an application to order the proctor for the wife—the party proceeding—to furnish to the adverse proctor a list of witnesses, some time anterior to their production. The general practice is quite otherwise. (a) It is incumbent, therefore, upon the husband, to show some good ground for so unusual an application; but what does the affidavit state? “That the deponent received a communication this day, and also a letter last week from Mr. Morse; and to the best of the deponent’s knowledge, information, and belief, he, Morse, is at the present time residing in France.” The charges are said to be serious, and to run through several years; and that it is, on that account, the more requisite to have a full opportunity of preparing the defence. But all the difficulty arises from the absence of the husband himself: the whole matter rests upon that fact: and it is said that he did not quit this country till long after the institution of the present suit. The question, then, is, whether a mere voluntary absence is a sufficient justification for the Court to depart from its ancient practice, and at the same time inflict a hardship upon the wife—the complainant—in the postponement of her cause.

In matrimonial suits, the power of the Court is *in personam*. The Court cannot enforce a decree upon a party who is out of the kingdom. Here the absence is voluntary; no cause is assigned for it; and nothing further is stated to induce me to violate an established rule of practice. If the absence were occasioned by particular circumstances,—from illness or urgent business, the Court might then be induced to afford every facility for the proctor to communicate with his party: but if I were to accede to this application, it would occasion great inconvenience and delay to the wife, not only in this, but in every succeeding stage of her cause. The more serious the charges, the more proper it is that the husband should be ready and prompt in his defence. Without looking into the counter-affidavit, I am of opinion that there is no sufficient ground before me to sustain this application.

Motion rejected.

(a) Oughton’s *Ordo Judiciorum*, tit. 80. See also *Ingram v. Wyatt*, vol. i. 94, 97. [3 Eng. Eccl. Rep. 42.]

HIGH COURT OF DELEGATES.

The PAROCHIAL SCHOOLMASTERS of Scotland v. FRASER and Others.—p. 613.

The appellants (interveners in the court below) being described in the commission of delegates as "the Parochial Schoolmasters of Scotland," *quære* whether, notwithstanding the absolute appearance of respondents, the inhibition ought not to be relaxed, on the ground that the appellants, not being a body corporate, had no *persona standi* in their collective capacity. Administration *pendente lite* and limited to certain property granted, by consent, to one of the parties.

THIS was an appeal from the Prerogative Court of Canterbury in the case of Colvin v. Fraser, ante, 113.

To a decree (issued at the instance of Mr. Fraser,) "against all persons in general having or pretending to have any right, title, or interest under or by virtue of the alleged will and codicil of John Farquhar, Esq. the party deceased, to appear and see proceedings if they should consider it for their interest so to do," an appearance had been given in the court below, on the first session of Hilary Term, 1828, on behalf of "the Parochial Schoolmasters throughout Scotland;" and a proctor alleged them to be the residuary legatees named in the will of the deceased, and prayed an answer to their interest. (a) But the assignation, to answer to such interest, was never complied with.

On the 1st of February, 1828, a proxy under the hands and seals of ten parochial schoolmasters of the county of Haddington: and, on the 23d of April, similar proxies from sixty-four of the parochial schoolmasters of eleven other Scotch counties were filed in the Prerogative registry; and after the sentence in that Court a petition for a commission of appeal, presented to the Lord Chancellor on behalf of "the Parochial Schoolmasters of Scotland," was granted; and, an inhibition having been served, a citation dated on the 5th of May 1829, issued, calling on Mr. Fraser and the other next of kin "to answer to the said Parochial Schoolmasters in their cause of appeal; and further to do and receive as unto law and justice should appertain; under pain of the law and contempt thereof, at the promotion of the said parochial schoolmasters."

On the first session of Easter term, the 8th of May 1829, appearances were given for the parties cited; a proxy on the part of John Farquhar Fraser, Esq. was exhibited, and the proctor for "the Parochial Schoolmasters" was, at the prayer of the adverse party, assigned to libel and bring in his appeal next court and to exhibit a proxy.

On the second session, the proctor for Mr. Fraser alleged, "that the Parochial Schoolmasters of Scotland were not a body corporate, and he moved the Con-delegates to direct the appellants to give security for the costs of the appeal, and also to decree letters of administration under certain limitations, and pending the appeal, to be granted to Mr. Fraser or Edward Vaughan Williams, Esq. his nominee, on giving justifying security."

These applications were grounded on two affidavits made by Mr. Fraser: the first concluded by stating in substance, "that in consequence of the decrees (issued at his instance) appearances were given in the said

(a) The will is printed, See p. 114 et seq. *notis*.

cause on behalf of the Parochial Schoolmasters of Scotland, as interveners, respectively claiming interests under the alleged will, ante, 125, that on the 25th of February last, the judge of the Prerogative Court pronounced against the alleged will and codicil, and decreed the letters of administration to be re-delivered out to this deponent; that the present appeal was interposed, not by the executor, the party principal in the aforesaid cause, but on behalf of the Parochial Schoolmasters of Scotland, whose proctor had appeared in the aforesaid cause as an intervener on their behalf; that such Parochial Schoolmasters were not, as he had been informed and believed, a body corporate, and that he verily believed that every individual member of the said society resided in North Britain, and out of the jurisdiction of this court."

The second affidavit, in order to move for an administration pending the appeal and limited to the receipt of certain rents of leasehold premises, interest on mortgages, and the principal of a mortgage (the mortgagee having become a bankrupt), set forth circumstances showing that the estate was incurring great risk from the want of a personal representative.

On these applications being made to the Court of Con-delegates, it was suggested that the petition to the Lord Chancellor was on behalf of the "Parochial Schoolmasters of Scotland," and not in the names of certain individuals of that body; that the commission, inhibition, and citation all followed the petition, but that it now appeared that the "Parochial Schoolmasters" were not a body corporate,^(a) and under these circumstances a very considerable doubt arose, whether (even admitting, that as individuals, they had a sufficient interest) they had collectively a *persona standi* for prosecuting the appeal, and whether the inhibition ought not forthwith to be relaxed.

The counsel for the schoolmasters contended, that even if they had not a right to appeal in their collective capacity, the persons who executed the proxies were entitled to proceed as individuals; that they had originally appeared in conformity to a decree to see proceedings issued at the instance of the next of kin, that the objection was now taken too late, as their interest had been admitted in the court below, both by the judge and by the adverse party in consenting to their intervention, and to their being heard by counsel; and further, that if the objection could be taken at all in this court, it ought to have formed the ground for an appearance under protest to the inhibition.

The counsel for the next of kin contended, that the formal instruments, viz. the petition, commission, inhibition, and citation, showed that the appeal was prosecuted on behalf of the body and not of individuals of the body, and that this rendering all the proceedings vicious, the present objection was fatal. They denied that the interest of the Schoolmasters had been admitted in the court below; for that, on the contrary, all questions respecting their right had been specially reserved by the court;^(b) and beyond that, as it now appeared on the face of the proceedings, that they were not a body corporate, the court was bound *ex officio*, to notice the fact, even if the parties were barred from raising

(a) *Quære*, whether if a body corporate, the appearance as given was good. It ought to have been by A. B. Syndic of the Parochial Schoolmasters of Scotland. Oughton, tit. 13. (n.)

(b) See ante, p. 125. *notis*.

the objection, owing either to their having appeared absolutely and not under protest, or to any other cause.

The Con-delegates referred the consideration of this question and of the two affidavits to the whole commission; but on the 3d of June, the motion for the limited administration being renewed, they decreed it (the other parties not opposing the same) to Mr. Fraser, limited as specified in the affidavit, and until the hearing of the matters referred to the whole commission, or until some further order.

The Judges Delegates were:—Mr. J. Bayley, Mr. J. Park, Mr. Baron Garrow, Drs. Arnold, Gostling, Blake, Haggard, Chapman.

The cause was called on for hearing before the whole commission on the 18th of June, when the counsel for the appellants declared that their parties proceeded no further in the appeal.

The limited administration, granted on the third of June, was then brought in; and the court decreed the inhibition to be relaxed.

Mr. Brougham and *Dr. Addams*, counsel for the Appellants.

Dr. Phillimore, *Dr. Lushington*, and *Mr. E. V. Williams*, counsel for the Respondents.

HAMERTON v. HAMERTON.—p. 618.

In a suit for separation by reason of the wife's adultery, after the arguments of counsel are closed and after the court has delivered its opinion, that, though culpable and suspicious conduct had been, adultery had not been, proved, it is a fit exercise of discretion to rescind the conclusion, for the purpose of admitting an allegation pleading further matter to establish the wife's guilt.

THIS was an appeal prosecuted on the part of the wife, from the Arches Court of Canterbury; (a) and the *præsertim* of the appeal was, "that the Judge had, on the third session of Hilary Term, 1829, rescinded the conclusion of the cause, and given leave to the proctor of William Medows Hamerton, to bring in a certain allegation theretofore by him tendered."

The allegation was immediately, upon the same session, brought into the registry.

After the usual proceedings in the Court of Delegates, the cause stood assigned for informations and sentence before the whole commission (b); and now came on for argument.

The *King's Advocate*, *Mr. W. E. Taunton*, and *Dr. Addams*, for the Appellant.

Mr. Campbell, *Dr. Lushington*, and *Dr. Dodson*, for the Respondent.

The Court pronounced against the appeal, and in favour of the order or decree appealed from, and remitted the cause.

(a) Ante, pp. 13 and 20.

(b) The Judges under this commission were:—Mr. Justice Burrough, Mr. Baron Hulloek, Drs. Arnold, Chapman, and Curteis.

SKEFFINGTON v. WHITE.—p. 626.

An administration *de bonis non*, granted in 1827, of an intestate who died in 1790, limited to assign a leasehold property not severed in the deceased's lifetime, and only mortgaged during an original creditor administration (which was granted on the renunciation of the next of kin at the time of the death and which expired in 1806) revoked; the next of kin for the time being (in whom all the beneficial interest in the deceased's estate was vested) not having been cited when the limited grant was made, and there being a suggestion that such grant was surreptitiously obtained, and that there was a surplus belonging to the deceased's estate.

THIS was originally a cause or business of citing Henry John White "to appear and bring into and leave in the registry of the Prerogative Court of Canterbury, the letters of administration of the goods, chattels, and credits of Thomas Hubbert deceased, left unadministered by Alexander Hubbert, whilst living, a creditor of the deceased, and limited, so far as concerned all the right, title, and interest of Thomas Hubbert in and to several pieces or parcels of ground, messuages, warehouses, buildings, hereditaments, and premises with the appurtenances, situate in the parish of Saint Mary Magdalen, Bermondsey, Surrey, described and comprised in certain indentures of lease bearing date the 23d of June 1788, and 7th of March 1791, and the residue and remainder of the terms of years therein granted, (a) and all benefit and advantage to be had, received, and taken therefrom, but no further or otherwise, theretofore granted by the Court to Henry John White, as a person for that purpose named by and on the part of William Davis, Benjamin Shaw, Sir Charles Flower, and John Green, and to show cause why the same should not be revoked and declared null and void." (b)

(a) The lease of the 23d of June 1788, was for the term of seventy-nine years. The demises under the lease of the 7th of March 1791, were for various terms; some had expired, and the longest term was for forty-eight years. These leases were stated on the part of Sir L. Skeffington, to be of considerable value.

(b) Previous to the grant of limited administration, two affidavits, the substance of which was as follows, were filed:—

John Green of Blackheath, Esq. made oath, "that he is one of the parties on behalf of whom application has been made for administration of the effects of Thomas Hubbert deceased, limited to all the deceased's estate and interest in certain hereditaments and premises (as comprised in the two above mentioned leases:) that by indenture dated the 23d of June 1818, the freehold and inheritance of the said hereditaments and premises became vested in the deponent, together with W. Davis, A. Jordaine, B. Shaw, and Sir C. Flower, subject to the said two indentures of lease and three annuities of 115*l*., 125*l*., and 420*l*. thereon charged, and in manner therein mentioned; the two former annuities being payable to Leonora Logie, widow, and the latter to Arabella Spriggs, widow; that the said indenture of lease dated the 23d of June 1788, with other title deeds relating to the said hereditaments and premises, has been in the possession of the deponent and said other parties or their agents from 1807; and the said indenture of lease, dated the 7th of March 1791, from 1824 to the present time; and he and they have been in the possession and in the receipt of the rents of the said premises, and have paid and discharged the taxes, rates, and other out-goings from 1818 to the present time; and the said several annuities have been from time to time paid by the deponent until their determination on the death of the said annuitants respectively; Mrs. Logie having died in 1821, and Mrs. Spriggs in 1824; that the said A. Jordaine is dead, and that B. Shaw is his surviving executor; that he (the deponent) verily believes, that certain original indentures dated the 31st of December 1790, the 27th of September 1802, and 6th of September 1805, (referred to in the proceedings with respect to the grant of the limited administration,) are so lost or mislaid that they cannot now be found, and that there are not any more authentic copies in the possession of the deponent, or of the said other parties, or their agents, than those produced. That in respect to a certain original deed poll, dated the 31st of January 1805, referred to, and to be produced, and appearing cancelled, the same is now in the same plight and condition as when it came into his possession with the other

To this decree an appearance, under protest, was given for Mr. White; and on the by-day after Trinity term, 1828, the cause having been argued on the statements contained in the act on petition, and on the affidavits, the Court rejected the petition of Sir Lumley Skeffington, and condemned him in costs. (a)

From this sentence an appeal was prosecuted to the High Court of Delegates; and after the usual formal steps the cause came on for argument at Serjeant's Inn, before the whole Commission, consisting of Mr. Justice Bayley, Mr. Baron Garrow, Dr. Daubeny, Dr. Blake, and Dr. Pickard.

Dodson, Haggard, and Mr. Knight, for the respondents.

Lushington, Addams, and Mr. Preston, for the appellant.

The Court pronounced for the appeal, directed a monition to issue to call in the limited administration; and condemned the respondent in costs.

title deeds as aforesaid: and lastly, that he has been legally advised, that the said administration of the unadministered effects of Thomas Hubbert deceased, should be granted to a nominee of the deponent, and the aforesaid other parties, by reason that such grant of administration to them or either of them, might operate in law as a merger of the aforesaid leases, and be thereby rendered of no effect."

Joseph Jones, of Bermondsey Wall, made oath:—"That in 1796, he entered into the employment of Thomas Rowcroft, then a London merchant, and he continued in such employment until 1818; that when he so entered into the said service he, Rowcroft, was in the possession and occupation of certain premises and warehouses situate in Cherry Garden, Bermondsey, and deponent was employed to superintend and take care of the same, and which hereditaments and premises are, as deponent verily believes, the same concerning which an application is now making to this court for administration of the unadministered effects of Thomas Hubbert, to be granted under certain limitations, as to the interest which he, the deceased, had in the same: that Rowcroft continued in possession of, and had the sole and exclusive management and control of the said hereditaments and premises, and, as deponent believes, was in possession of certain leases therein granted, and also in the sole receipt of the rents and profits thereof from 1796 to 1818; and during the whole of that period, paid all rates, taxes, assessments, and outgoings whatsoever chargeable thereupon, and until the said premises were in the latter year conveyed by Rowcroft to Davis, A. Jordaine, B. Shaw, Sir C. Flower, and J. Green."

(a) *Skeffington v. White*, Vol. I. 699. [3 Eng. Eccl. Rep. 297.]

WESTMEATH v. WESTMEATH.—p. 653.

The Court will pronounce an Irish Peer in contempt for non-payment of costs, and direct such contempt to be signified, leaving the Lord Chancellor to decide whether the writ *de contumace capiendo* should issue.

FREE, D. D. v. BURGOYNE.—p. 662.

A clergyman may be deprived for fornication without previous monition or suspension. Sentence of deprivation affirmed with costs. (a)

(a) O. J. by *Burgoyne v. Free, D. D. supra*, 192.

SAVAGE v. BLYTHE.—p. 150.

The stat. 21 Hen. 8. c. 5. applies only to such as are next of kin at the time of the death. Therefore the Court made the *de bonis non* grant to the executor of the administrator (the sole next of kin at the death) in preference to persons entitled in distribution, who had received their shares and signed releases.

ABRAHAM COCKER died intestate, leaving a brother and several nephews and nieces. Administration was granted to the brother; and at the end of the year he distributed, taking the deceased's securities upon himself. The administrator died, leaving the securities due to the original deceased outstanding: he made a will, and appointed an executor.

A decree was taken out against the nephews to show cause, why the administration *de bonis non* should not be granted to the executor of the brother administrator. The nephews appeared, and prayed administration.

Sir *William Scott* and Dr. *Nicholl* for the executor.

The question is, whether the executor of the administrator or the next of kin is entitled to the administration *de bonis non*. It was necessary to cite the next of kin, though they have received their shares, executed releases, and thus discharged their interest. The Court is inclined in such grants to follow the interest, and give the handle to the person who has the interest. It would not, unless compelled by law, give the grant to persons without any interest. The 21 Hen. 8, c. 5, enacting that, on the death of an intestate, the administration is to be decreed to the next of kin, does not apply: it has been complied with: the administration was so granted in the first instance. The Court is not to go on *in infinitum*. Where a party has parted with all his interest in the effects, he has no right to the administration. *Young v. Pierce*, Freeman, 496. Great danger and inconvenience would ensue, if persons were permitted to come into the management of the estate who have no interest, and who would have only to pay over to those entitled. This is the principle of the ordinary practice of granting administration with will annexed to the residuary legatee, though against the words of the statute, *Isted v. Stanley*, Dyer, 372.

Dr. *Swabey*, contra. Though the parties have released their interest, they have not renounced their right to the administration. In *Young v. Pierce* there was an agreement that the other party should take administration. In *Isted v. Stanley* the point decided was, that an executor of an executor, dying before probate, was not executor to the original testator, though entitled to administration if the residue was bequeathed to his testator; it is true, it was stated that though there were next of kin it was the course of office to grant administration to the residuary legatee, which was (the reporter says) allowed to be law. The question is, whether the 31 Edw. 3. and 21 Hen. 8. are obligatory on the Court. The Court is only ministerial: the statutes leave it no discretionary power. The practice of the Court inclines to the person having the beneficial interest, as in the case of a residuary legatee, and where the option is left to the Court; but it has only such a discretionary power when the parties are in equal degree, or between a widow and next of kin who are equally entitled. It has no further discretion. The statute is as obligatory on the second grant as on the first. In *Prior v. Moss* (Prerogative, 1772, April 10) "Moss died intestate. The mother of the intestate died without taking administration, and made Prior executor. The uncle of the deceased took out administration. Prior, the executor, called it in as having all the interest under the will. The Court (Dr. Bettesworth) held it well granted to the next of kin to the intestate." In *Elliot v. Collier*, 3 Atk. 526, 1 Ves. Sen. 17, 1 Wils. 168, Lord Hardwicke held the husband entitled to the interest without the administration.

Per Curiam (Sir WILLIAM WYNNE.)

I understand the rule of the office to be, to grant administration to those who are next of kin at the time of the death: but, where a representation has been taken out and another is wanted, the course of the office is to make the grant to the interest and not to persons who were not next of kin at the time of the death, but who have since become so. Such is laid down by Sir Edward Simpson to be the rule of office, *infra*, 229. In the case of *Young v. Pierce*, an administration was granted by the Prerogative and Delegates to the interest, viz. to the executor of one next of kin, in exclusion even of another who was also next of kin at the intestate's death, but who had released her interest. Here the parties were not next of kin at the death, for they are nephews and nieces, and there was a brother. I conceive that, such being the case, they are not entitled to this administration: for the statute looks to the next of kin at the time of the death, not to the next of kin when a second grant is wanted, and the Court will grant the administration to the representative of the original administrator in preference to a person who, by the death of intermediate persons, becomes the next of kin when the second administration is wanted. *Lovegrove v. Lewis*, before the Delegates, was a case of this kind. (a) The question is not, whether the same rule applies to administrations *de bonis non* as to original administrations; but whether the statute does not apply only to such as were next of kin at the death. But, in order to look more fully into the cases, let the matter stand over.

On the by-day, the cause came on again.

Dr. *Swabey* cited *Hole v. Dolman*, *infra*, 237; *Kinleside v. Cleaver*, *infra*, 237; *Walton v. Jacobson*, Vol. I. 346, [3 Eng. Eccl. Rep. 150] and *Whitehill v. Phelps*, (Prerogative, 1711, E. T. 2 Sess.) "Whitehill died intestate, leaving a widow and no children. The widow took administration and made her son executor. He prayed administration *de bonis non* to the husband. This was opposed by the mother of the husband. Administration *de bonis non* was granted to her, though according to the custom of London, the widow had the right of distribution." The case cited from Freeman the reporter thinks contrary to law. Unless *Lovegrove v. Lewis* (of which case I was not aware on the former day) had occurred, the cases to which I have referred would have been decisive. That case has established a distinct principle; the only distinction from the present case is that here the parties were originally in distribution, but they have released their interest.

Sir *William Scott* and Dr. *Nicholl*, contra.

(a) *Lovegrove v. Lewis and Lewis*. (Prerog. 1772, Trin. Term, 2d Session.)—John Bidleston died in November 1761, a widower, intestate, leaving two sons—the only persons entitled in distribution. John Bidleston, one of the sons, took out administration to his father in 1761. Thomas, the other son, died in 1762 intestate, leaving his brother John his only next of kin. John, the administrator, by his will, dated 13th September 1763, appointed Lovegrove his sole executor. The validity of that will being contested, it was pronounced for by the Prerogative Court and by the Delegates. Lovegrove was sworn administrator of Bidleston, the father. John and Richard Lewis opposed the grant on the ground that they were the cousins-german, and then next of kin of John Bidleston, the father, and, as such, asserted their right to the administration *de bonis non*. It was alleged that they had no interest in the effects. Sir George Hay decreed letters of administration *de bonis non* of John Bidleston, the father, to be granted to Lovegrove, the executor and residuary legatee of John Bidleston, the son and administrator. And this sentence was, on the 29th of April, 1773, affirmed with costs, by the Court of Delegates. The Judges present were:—Aston J. Blackstone J. Ma-cham, and Loveday, LL.D.

The question is, whether the other party has a statutable right, and whether the Court is consequently bound. It turns on the construction of the statute—on the words “next of kin.” We apprehend they mean *the next of kin at the time of the death*. Great inconvenience would result if the Court did not attend to this limitation, but extended the term to all the branches to whom it may be derived. To say that any one can *acquire* the relation of “next of kin” to a person, after that person is actually dead, would be absurd. The term must only mean those who are so at the time of the death. No person, therefore, having a statutable right, the Court will grant it, in its discretion, to the interest.

Per Curiam.

Abraham Cocker, the deceased, died intestate, a bachelor without parent, leaving a brother and seven nephews and nieces; the brother took administration; he died, leaving goods unadministered, and, having appointed Savage his executor; the representative of the brother and administrator applies for administration *de bonis non*; this is opposed by the nephews and nieces, who claim it under the statute. The brother, at the death of the intestate, was the sole next of kin and solely entitled to the administration. The nephews and nieces were then entitled in distribution, but not to the administration. The only question is, whether the nephew, who had no right to the administration at the death, is now entitled by devolution on the death of the brother.

It is argued, that it has been held that it ought to be granted to the next of kin at the time of the grant. This is founded on several cases, deciding that the administration to the wife is not grantable to the representative of the husband but to the next of kin of the wife. By the ancient practice, on the death of the husband administrator, the Court granted the administration *prius petenti*—to the kin of the husband or of the wife. *Hole v. Dolman*, *infra*, 237, determined, that it was grantable in preference to the wife’s kin and not to the representative of the husband: after which two other cases were decided, viz. *Kinleside v. Cleaver*, *infra*, 237, and *Walton v. Jacobson*, vol. i. 346. [3 Eng. Eccl. Rep. 150.] But this case does not fall within the principle there decided; for, in those cases, the kin were next at the death, the husband not being considered as kin but having a claim in a distinct character; and therefore the Court held that the wife’s next of kin in those cases had an absolute statutable right, on which they granted it. Such also is the case where the administration is granted to the widow; she does not take it as next of kin.

The question then is, whether the grant is to be made to the representative of the person who took as next of kin, or to those who have become next of kin at the time of asking for the grant. By the practice of the office the statutable right is confined only to the kin at the time of the death; afterwards to grant it to their representatives. So in a note of Sir Edward Simpson, in which, advertising to the case of *Hole v. Dolman*, that learned Judge says:—“The rule there seems to mean only to the next of kin at the death of the deceased, not to whom may happen afterwards to be next of kin at the time a question arises upon the grant of administration; for a dead man can have no next of kin; he is not in a capacity to have next of kin at the time he becomes so. Therefore, by the course of office, it is granted to the interest, when the next of kin at the time of the death is not living at the grant of ad-

ministration *de bonis non*; except in the case of next of kin of wife and representative of the husband—then granted to the next of kin. Undoubtedly by the statute, the grant of administration to next of kin is good; but when the next of kin, who were so at death of deceased, are dead, then it is in the heart of the Court to grant it to the next of kin or the interest, and the grant does not depend on the statute but the rules of the Court—may grant it to next of kin, may grant it to interest, without regard to greater or less interest, according to the circumstances.” In exact affirmance of that principle was the judgment of Sir George Hay, in *Lovegrove v. Lewis*, *supra*, 228. *notis*, which was affirmed by the Delegates with costs. There it could not be denied that the cousins were the next of kin at the time of the grant, yet Sir George Hay and the Delegates decreed it to the interest. In this case the nephews were not next of kin at the death, though in distribution; but the greater interest at the death was in the brother, and therefore his representatives have the greater interest. Not only so; it is stated that payment was made to the nephews and nieces in full satisfaction of their distributive shares, and that they gave releases; so that they have now no interest as appears on the face of the releases. But it is said that they protest against the effect of their releases, and against any use to be made of them; and it is argued that they may apply to some Court to determine on their validity: it is not, however, suggested that they were improperly obtained, nor that any proceedings are going on to invalidate them. Though the Court has no right to try the validity of these releases, yet it must take notice of them as it does of marriage-articles allowing a wife to make a will, which, being upon the face valid and their validity not appearing to be contested, the Court grants probate. By the same plea that the effect of these releases is sought to be avoided, a husband might always avoid his wife’s will. I am of opinion that the nephews have no statutable right as they were not next of kin at the time of the death. The course of office in that case is to grant the administration to the superior interest, viz. in this case, to the representative of the administrator, who would take half; and the interest of the others is released. Under the circumstances the interest is so clearly in the executor of the deceased administrator, that I shall grant the administration *de bonis non* to him.

ALMES v. ALMES.—p. 155.

Where the Court is not bound by the statute of 21 Hen. 8. c. 5, it always grants the administration to those who have the interest. Administration *de bonis non* granted to a person, entitled under a deed of gift from the first administratrix to the whole beneficial interest, in preference to one who was not next of kin at the time of the death, and who consequently had no statutable right.

Sir *William Scott* and Dr. *Nicholl*, for Elizabeth Almes, relied on the recent decision in *Savage v. Blythe*.^(a)

It was contended, contra, that by taking out a decree calling on the son to accept or refuse the administration, the other party had waived their own right; at least that the son should be indemnified for his costs.

(a) See preceding case.

Per Curiam (Sir WILLIAM WYNNE).

Administration is prayed of the goods of William Davis left unadministered by his sister, who in her lifetime conveyed all her interest in the effects of William Davis by a deed of gift to her daughter-in-law, Elizabeth Almes, one of the parties. And the question is, whether Elizabeth Almes or William Almes, the son of the administratrix and the nephew and next of kin of William Davis (but who was not so at the time of the death), is entitled to administration *de bonis non*.

It is not denied that the entire interest is in her; nor that the other party is fully aware of that fact; for he was a party to the deed. Has, then, William Almes a statutable right by which the Court is bound?

When there is a statutable right, the Court always grants it, except in a few instances—that of a residuary legatee for example. William Almes was not next of kin at the time of the death, and had no right nor interest then, nor has he any interest in the effects now. He has, then, no statutable right. I so decided in *Savage v. Blythe*, where the question was between the executor of the brother (administrator of the deceased) and nephews and nieces, who, though they were not entitled to the administration, would have been entitled in distribution if they had not signed releases. That case I determined on the authority of Sir George Hay's decision, in *Lovegrove v. Lewis*, affirmed by the Delegates. There, those who were not next of kin at the time of the death were held not to be entitled under the statute to the administration *de bonis non*, which was granted to the executors of the administrator. The present case is rather stronger than *Savage v. Blythe*. Where the Court is not bound by the statute, it will always grant the administration to those who have the interest. Then there is no doubt that Elizabeth Almes is entitled.

There must have been some mistake in taking out the decree calling upon the other parties to accept or refuse administration, instead of to show cause why it should not be granted to Elizabeth Almes. There is a kind of inconsistency in this decree with the application for the grant of administration to her. It cannot be the course of office that such should issue: but, as that might have been explained without entering into this petition, it was not necessary to bring the question before the Court; and on this ground I shall not decree the costs to be paid by the person taking out the decree. Let administration pass to Elizabeth Almes.

KINASTON v. MILLS.—p. 158.

Chose in action to wife. Husband, administrator, dies without altering property, and makes a will: his administrator with will annexed takes administration *de bonis* to the wife; that administration called in by her next of kin and revoked, the property not being altered by the husband.

Margaret Burnet (otherwise Kinaston), the wife of Major William Burnett, died entitled to the sum of 1400*l.*, the property whereof the said William had not altered. He took administration to her, and made his will; and died, being killed in a duel. Francis Mills takes out administration to him with the will annexed (no executor being named in the will), and afterwards takes administration *de bonis non* of Margaret.

Burnett. John Kinaston, brother of Margaret and next of kin, cites him to show cause why the administration *de bonis* should not be revoked and granted to him. Sir Richard Raines, the Judge of the Prerogative Court, revoked the administration accordingly. What belonged to Margaret, being a chose in action, and the property not altered, goes to her next of kin, and not to the executor or administrator of the husband. (a)

(a) In the case of Burnett v. Kinaston, (Prec. in Ch. 118. S. C. 2 Freeman, 239. Trin. Term 1700. which related to the effects of the same party deceased) Sir Nathaniel Wright, Lord Keeper, held that the money there in question, a chose in action, belonged to the administrator *de bonis non*, and was not distributable among the surviving husband's next of kin; but "the point is now settled that if the husband survive his wife, then he, as her administrator, will be entitled to all her personal estate which continued in action or unrecovered at her death; and although he die before all such property be recovered, yet his next of kin will be entitled to it in equity." 1 Roper, Husband and Wife, 205, and cases there cited.

AMHURST v. AMHURST and BAWDES.—p. 158.

Estate not vested by law or equity, administration *de bonis non* to the next of kin.

Charles Amhurst makes his will, and Dorothy Amhurst and Lady Selby his executors, who prove it. 1000*l.* legacy is charged on the estate for them. Dorothy dies intestate, and her husband takes administration to her and makes his son executor, who prays administration *de bonis non* of Dorothy. Charles Selby, a sister's son of Dorothy, prays administration as her next of kin.

Ex parte Selby.

Applying for administration shows the estate not vested; it must be granted to the next of kin, 21 Hen. 8. c. 5. If the estate had been vested in the husband, his executor would have had it without administration. If the husband had been her executor, if the husband and wife had assigned the legacy, or if the husband in his life had taken security, he might have released the legacy; but, not having done it, it no ways vests in him. Though a sentence be given for a legacy, yet if not paid, it will go to the administrator *de bonis non*. (a) The husband is not to have execution for a debt of the wife's recovered by them. Orphanage money in London, if not recovered, shall be considered as a chose in action, and the husband cannot dispose of it. (b) Administration is to follow the interest where there is a residuary legatee. Distributees have an interest vested in them. Before the 31 Edw. 3. c. 11, the ordinary had nothing to do with choses in action. (c) It is held in B. R. that an estate *pour auter vie* is not distributable.

[Contra.—In Chancery the opinion is, that an estate *pour auter vie* is distributable. Though the estate be not vested in the husband, yet the interest is which he transfers to his representatives, and the administrator will be trustee for them.](d)

(a) See, however, Heygate v. Annesley, 3 Bro. Chan. Rep. 362.

(b) Pheasant's Case, 2 Vent. 341.

(c) See Hensloe's Case, 9 Co. 39.

(d) By 14 Geo. 2. c. 20. estates *pur auter vie*, in case there be no special occupant thereof, are made distributable.

In continuation. The same law is in an administration *de bonis non*, as in a common administration. It is not discretionary with the ordinary to grant it where the interest is. *Whitehill v. Phelps*, cited ante, p. 228. In *Harcourt v. Lady Smith*, Delegates, 1709, "Sir Samuel Astrey made his wife executrix: she married Mr. Harcourt, and died leaving goods unadministered; she not being residuary legatee, the administration *de bonis non cum testamento annexo* was granted to the sister and next of kin." And in this case the interest was not considered, but only the statute 21 Hen. 8. c. 5. The interest is not considered by the 21 Hen. 8. c. 5, but a proper person to represent the deceased. If the executor does not prove the will, the next of kin shall represent him. If *Amburst* were administrator he would only be trustee for the next of kin.

E contra.

The question in the principal case is, whether the interest is vested in the husband: for this case does not depend upon the 21 Hen. 8. c. 5, but rather on the statute of Distributions, where administration is to follow the interest; as in *Astrey's* case the residue not being disposed of belonged to the next of kin. This was the opinion of the Prerogative Court and of the Delegates. The ordinary was administrator before the 31 Edw. 3. c. 5. That statute directed administration to be granted to the next of kin. A dispute arose thereupon, whether the wife was not next of kin, and administration to be granted to her, which occasioned the statute 21 Hen. 8. c. 5. Upon that, inquiry was made whether the husband was next of kin to the wife and determined,—in *Ognel's* case, 4 Co. 51; *Johns v. Rowe*, Cro. Car. 106,—that administration did belong to the husband *mero jure*. *Hughes' case* was the cause of the statute of Distributions, (a) and the law therein makes the intestate's will; and if the party having a right to distribution, die before all is collected, his next of kin shall have administration, and not the next of kin of the first intestate. (b) The husband is the next of kin, and has a right to the whole, for the law has made the wife's will, and vested all her right in him. The universal legatee, and not the next of kin, shall have the administration, where there is no executor. Even a residuary legatee is preferred to the next of kin. *Isted v. Stanley*, Dyer, 372. *Thomas v. Butler*, 1 Ventris, 217. In the case of *Culpepper v. Porter*, 1681, "Porter married Culpepper, who had a legacy of 1000*l.* left her by her father. After her death, the husband takes administration to her, and dying makes his son executor, who takes administration *de bonis non* to Mrs. Porter, formerly Culpepper, and is called upon by the next of kin of Porter, to show cause why it should not be revoked. The administration is confirmed to the executor against the next of kin." Every legatee has an immediate interest. The husband had a right to the legacy left to his wife, which he transmitted to his executors. In *Early v. Cole*, "Early made his will, and gave a legacy of 50*l.* to his daughter: she married: 20*l.* of the legacy was left unpaid at the death of

(a) *Hughes v. Hughes*, 1 Lev. 233. On prohibition, the Court of King's Bench resolved, "that the Ecclesiastical Court could not oblige an administrator to a distribution, and that their bonds taken to that intent were void." The arguments are reported in Carter, 125, and at the conclusion is the passage that follows:—"Et puis per act del Parliament pur melieux settlement des intestates estates fuit contrived."

(b) *Brown v. Shore*, Carth. 52, 1 Show. 25. *Palmer v. Allicock*, 3 Mod. 58.

her and her husband, who survived. The husband's brother and wife's mother apply for administration; it was granted to the husband's brother." Arrears of rent due to the wife shall go to the executors of the husband, 32 Hen. 8. c. 37.

Per Curiam (Sir CHARLES HEDGES).

This estate, not being vested either by law or statute, (a) by the 21 Hen. 8. c. 5, the administration must be granted to the next of kin. Administration of part of the estate must go as the administration of the whole would do. As it is an intestate's estate of a chose in action not recovered, it must go to the next of kin.

(a) Lord Chancellor Cowper and Lord Chancellor Parker, however, held that the wife's choses in action did vest in the husband by the statute of distributions. See *Squib v. Wyn*, 1 P. Wms. 381. So did Lord Hardwicke, in *Humphrey v. Bullen*, 1 Atk. 458, and in *Elliot v. Collier*, 1 Ves. 15.; 3 Atk. 527; 1 Wilson, 169.

REES v. CART. (a)—p. 161.

Administration of the wife's goods to the executor of the husband, who died without taking administration to her.

ANN CHURCH made her will, dated 2d February, 1709, and made John Church Metcalfe, sen., one of her executors and her residuary legatee. Elizabeth Metcalfe made her will and likewise Metcalfe, sen. her executor and residuary legatee. He took probate of both wills; made his own will, and his wife Jane his executrix and residuary legatee,—leaving goods of Ann Church and Elizabeth Metcalfe unadministered. Jane Metcalfe proved his will, and afterwards married John Rees. She died on 10th June 1717. No administration was taken to her. John Rees died in August 1717, having made his will, and his brother, Richard Rees, executor. Richard proved the will in the Archdeacon's Court of Middlesex. In October 1717, Jane Cart (mother of Jane Rees, *alias* Metcalfe) applies for administration to her. A caveat is entered by Barbara Jordan and John Church Metcalfe, a minor. Jordan—as surviving daughter of Ann Church—prays administration *de bonis non* to her. John—as grandson to Elizabeth Metcalfe, and great grandson of Ann Church, and nephew to John Church Metcalfe sen., prays administration *de bonis non* to them to be granted for his use, before the grant of Jane Cart's, (*alias* Metcalfe's, *alias* Rees') administration to her mother. (Richard Rees was not cited, and no ways a party to the caveat.) No interest appearing to bar Jane Cart from having the administration to her daughter, the Court granted it to her; and by virtue thereof she obtained letters of administration *de bonis non* to John Church Metcalfe, sen. Elizabeth Metcalfe and Ann Church. Afterwards Richard Rees calls her by process to shew cause why the administration should not be revoked and granted to him, being executor of his brother who was husband to Jane Rees, *alias* Metcalfe.

Ex parte Rees. (b)

(a) Cited in *Squib v. Wynn*, 1 P. Wms. 381. Viner, Executors (K.) 22.

(b) In the arguments in this case, and in *St. Aubyn v. Page*, and in *Plaidel v. Howe*, (*infra*, pp. 236, 7.) the passages that seemed to be a mere repetition of the arguments in *Amburst v. Amburst*, *supra*, 232. have been omitted.

It is still *res integra* as to Richard Rees, he never having been cited or any way precluded. Where the whole interest is vested, administration must go with the interest, and not according to the statute. *Isted v. Stanley*, Dyer, 272. *Thomas v. Butler*, 1 Ventris, 217. *Ognel's case*, 4 Co. 51. *Johns v. Rowe*, Cro. Car. 106. *Wilson v. Drake*, 2 Mod. 20. The husband is not obliged to distribute. It makes no alteration that the husband did not take administration; for the administration continues no privity: but the interest being once vested is transmissible, the right not depending on the 21 Hen. 8. c. 5. but on the statute of Distributions; and the executor has the same right as the husband had. *Hæres succedit in universum jus quod defunctus habuit*. *Earl of Winchelsea v. Norcloff*, 2 Reports in Chancery, 165. *Brown v. Shore*, 1 Show. 25. *Palmer v. Allicock*, 3 Mod. 58. That the administration must go with the interest and not with the blood was determined in this very case, when the administration *de bonis non* was granted to Jane Cart, and Jordan and John Church Metcalfe were refused by the Court. The same has been determined in other cases, *Culpepper v. Porter*, cited in *Amhurst v. Amhurst*, ante, 233. *Early v. Cole*, ibid.

E contra.

The mother is in possession of a simple administration to Jane Rees *alias* Metcalfe. The administrations with the will annexed depend upon that. Simple administrations are always governed by the statute. The interest is not considered. A man dies intestate leaving two children; one dies leaving a child; that child cannot have the administration, though equal in interest. John Metcalfe, the minor, was not the next of kin to Jane Rees, and therefore was refused. Upon her death the privity was discontinued. The husband not being administrator to her could have no right after her death. *Astrey's case*. *Amhurst's case*, supra, 232—3.

In reply. In the cases of *Astrey* and *Amhurst* there was no residuary legatee.

Per Curiam (Dr. BETTESWORTH).

The only question is, whether the administration ought to follow the interest or the blood. If the husband had taken administration, there is no doubt that the whole property had vested in him. Whether, then, his not having done it, shall bar his executor. The interest being in him, the executor may at any time take the administration the husband was entitled to. The administration to Jane Rees, and the *de bonis non* administrations to Church and Metcalfe ought to be revoked and granted to the executor.

Note. The case of *Powell v. Trigges*, 1727, 2d October, was inserted among the list of cases, in support of the husband's representatives, by Dr. Simpson in his Report of *Rees v. Cart*. It appears from the Assignment-book that Powell, the sister of the deceased, called in the administration granted to Trigges; but the Court directed it to be re-delivered to Trigges. No other particulars can be discovered.

ST. AUBYN v. PAGE.—p. 163.

Administration of a *feme covert*, granted to the daughter of the third husband, revoked, and granted to the grand-children by her first husband; it being shown that an estate would come to them.

LADY ST. AUBYN, relict of Sir John, married afterwards to Spencer, and had a third husband, Page; she dying intestate, Page takes administration and dies intestate. Elizabeth Fursden, a creditor by mortgage, calls Sir John St. Aubyn, the grandson and next of kin, to show cause why administration *de bonis non* should not be granted to some third person to substantiate proceedings in Chancery, and upon his not appearing it was granted to Ann Page, daughter of Richard Page by another wife, as next of kin to him. Sir Richard Vyvyan, (testamentary guardian of Sir John, Peter James, Mary and Martha St. Aubyn—minors and grandchildren) calls upon Ann Page to show cause why the said administration *de bonis non* should not be revoked and granted to him for their use.

Ex parte St. Aubyn.

The estate of the wife does not vest in the husband by marriage otherwise than as in possession. Hale's Analysis of the Law, ss. 14. 27. pp. 47. 78. 1 Inst. p. 351. b. If the husband does not recover the wife's *choses in action*, as administrator, and die intestate, no property can be transmitted to him. The husband is not included in the Statute of Distributions, but by the last section of the Statute of Frauds and Perjuries his case is provided for. By the former statute the distributable share vests immediately, but until that statute it was not so. The husband, therefore, not being entitled to the whole by virtue of that statute must remain in the same case as other common administrators were, and what is left unadministered must go to the next of kin. (a)

E contra.

We admit it to be law that *choses in action* do not vest in the husband by marriage, but the estate which is in the wife's possession does. Fact is wanting in order to found the law. Page being in possession of an administration ought to be continued therein, unless it shall be made appear that there are *choses in action* still remaining which were not collected by the husband.

Per Curiam (Dr. BETTESWORTH).

The administration not to be revoked without showing that there is some estate remaining which will come to the grand-children. To give an allegation on the next court day.

Note. It was afterwards alleged that several debts owing by Spencer (the second husband) were discharged out of her separate estate. He having mortgaged the most part of his estate for his debts, the mortgage was transferred over in trust for her to the Marquis Worcester and Mr. Justice Fortescue. The allegation was confessed; and the Court revoked the administration *de bonis non*, and granted it to the guardian for the use of the minors.

(a) In *Cart v. Rees*, (cited in *Squib v. Wyn*, 1 P. Wms. 382.) Lord Chancellor Parker said, "that the husband was within the statute of distributions so as to take the wife's *choses in action*; and that this was not a new point."

PLAIDEL v. HOWE.—p. 164.

A legacy to a wife not received by her or her husband, nor administration taken to the wife by the husband: his executor and not the next of kin to have administration to the wife.

JAMES HOWE by a codicil to his will, 13th November 1714, makes Ann Gilman, wife of George Gilman, executrix and residuary legatee. She proved the will and died. Her husband survived, but died without taking administration. He made his will on 25th April, 1722, and Christopher Plaidel his executor, who is called at the instance of a creditor, to accept or refuse administration *de bonis non* of James Howe. He is opposed by Sarah Howe, daughter of Howe and sister of Ann Gilman.

Ex parte Plaidel.

Every legatee has an immediate interest. Ann Gilman, being residuary legatee, the whole personal estate, after debts and legacies paid, vested in her, and consequently in her husband. *Early v. Cole*, cited in *Amhurst v. Amhurst*, ante, 233; *Thomas v. Butler*, 1 Ventris, 217; *Earl of Winchelsea v. Norcloff*, 2 Reports in Ch. 165; *Cary v. Taylor*, 2 Vern. 302; *Rees v. Cart*, ante, 235.

E contra.

The residue did not vest in him as husband. It was a *chose in action*, and the husband never had the administration. It remains the property of the first deceased, Howe, not altered.

Per Curiam (Dr. BETTESWORTH.)

Administration granted to the executor of the husband.

DARLEY v. WHADDON.—p. 165.

Administration *de bonis non* to a *feme covert* granted to the representative of the husband, administrator, in exclusion of the wife's kin.

ELIZABETH HOILE, *alias* Auckland, died in 1715; her husband took administration to her, and died in 1728. Administration was granted to Mrs. Whaddon, his sister, in 1729; and in 1732 she took administration *de bonis non* to Elizabeth Hoile. This was held to be according to the course of the office. If the estate of Elizabeth had only been an estate not in possession, Mrs. Whaddon would not have been entitled. *St. Aubyn v. Page*, ante, 236; *Kinaston v. Mills*, ante, 231. But the property consisted of South-sea stock, in the names of Elizabeth Auckland, the mother, Elizabeth, the daughter, and Mr. Hoile. The Court dismissed the next of kin without costs.

HOLE, otherwise WELLINGTON, v. DOLMAN.—p. 165.

[See the Report, 3 Eng. Eccl. Rep. 150.]

An original administration to a *feme covert* decreed to her next of kin in preference to the representative of the husband who survived her.

KINLESIDE v. CLEAVER.—p. 169.

[See the Report, 3 Eng. Eccl. Rep. 150.]

After the death of the husband, administrator of his wife, administration *de bonis non* granted to her next of kin in preference to the husband's representative.

1826, 2, 32.

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CONSISTORY COURT OF LONDON.

The Earl of WESTMEATH v. The Countess of WESTMEATH.—

p. 1.

10 Pages, 35.

In answer to a suit for restitution of conjugal rights brought by the husband, legal cruelty being established, but a reconciliation and matrimonial intercourse having afterwards taken place, the Court enjoined the wife to return to cohabitation, holding, that there was no proof of subsequent misconduct by the husband, sufficiently removing the bar of condonation, and reviving the previous cruelty, to entitle the wife to a sentence of separation.

Reconciliation will supersede the ground of complaint in the Ecclesiastical Court, as it annihilates articles of separation at common law.

In answer to a suit for restitution of conjugal rights, the wife, (having pleaded cruelty and adultery) proved several acts of personal ill-treatment, violent behaviour and language, from 1813 to 1817; a separation was then agreed upon, but, on a reconciliation, matrimonial cohabitation and intercourse were renewed. The court, on appeal—holding that adultery was not proved; that cruelty, up to 1817, was proved, and that, though afterwards there was no personal violence, his conduct, exciting reasonable apprehension of it, revived the former cruelty;—decreed a separation, and condemned the husband in the costs in both Courts, except those incurred by certain charges of adultery.

To entitle a wife to separation by reason of cruelty, there must be ill treatment and personal injury, or the reasonable apprehension of personal injury.

Aggravations of cruelty may arise from the station of the parties; from the condition of the sufferer; from natural or even acquired feelings.

If legal cruelty be established, a subsequent reconciliation and matrimonial intercourse form a legal bar to a separation for such preceding cruelty. And the question then is, whether any subsequent acts take place furnishing fresh grounds of legal complaint, or at least reviving former wrongs, and, in connection with those former wrongs, creating reasonable apprehension of a renewal of ill treatment.

The force of condonation as a bar varies according to circumstances. The condonation by a husband of a wife's adultery, still more repeated reconciliations after repeated adulteries create a bar of far greater effect, than does the condonation by a wife of repeated acts of cruelty.

Cruelty generally consists of successive acts of ill-treatment, if not of personal injury, so that something of a condonation of the earlier ill-treatment necessarily takes place.

If a wife, after legal cruelty, consents to a reconciliation and to matrimonial cohabitation, former injuries would revive by subsequent misconduct of a slighter nature than would constitute original cruelty, though the reconciliation would be a bar if no further ill-treatment took place.

A deed of separation, upon mutual agreement, on account of unhappy differences, though containing a covenant not to bring a suit for restitution of conjugal rights, is no bar to such a suit.

On the execution of articles of separation, not followed by matrimonial intercourse, the wife's reluctant assent to the husband having a bed-room in her house, at the earnest intreaty of him and of mutual friends, and on his declaring, "that he should be merely under the roof by sufferance," is no continuation of a former condonation.

THIS was a cause of restitution of conjugal rights, brought, in the Consistory Court of London, by the Marquess of Westmeath against the Marchioness of Westmeath, his wife, in which the citation was returned on the first session of Easter Term, 1821; on the fourth session of Trinity Term, a libel, in the usual form, and consisting of seven articles, was admitted; it pleaded "the marriage on the 29th of May, 1812, cohabitation at various places, and the birth of two children; but that on the 14th of June, 1819, the Marchioness of Westmeath quitted his house and had since refused to cohabit with him." On the first session of Michaelmas Term the marriage was confessed; and on the first session of Hilary Term, 1822, an allegation consisting of thirty three articles with ten exhibits annexed was admitted, wherein Lady

Westmeath, after pleading the marriage, cohabitation, and birth of children, by way of further answer to his libel alleged, in substance; "That soon after July or August, 1812, Lord Westmeath began to treat her with great cruelty and harshness, and was guilty of acts of violence and indignity on several occasions in 1813 and 1814; that in 1815 her health was much affected; that notwithstanding this, the Marquess continued without cause to quarrel with and abuse her; that on such occasions his language and behaviour were most violent, and she was kept in a continual state of alarm and fear, till at length she intimated to him, that unless he ceased so to treat her she should be compelled to proceed for a legal separation; that he persisted in that his ill treatment, but that, in September 1815, on his promising to alter his conduct, and on the intercession of a mutual friend, she agreed to forego her intention of applying for a divorce, and consented to continue to live with him." It further pleaded, "a specific act of violence in December 1815, a continuance of his ill conduct, and that in consequence thereof in the summer of 1817, she declared her intention to apply to the laws for protection, but that on his proposition it was agreed that he should execute a deed of separation on his return from Ireland, whither he was then about to proceed; that during his absence in Ireland he wrote certain letters (six of which were exhibited) expressing his contrition for the cruelty of his conduct; and that the Marchioness, moved thereby, expressed by letter a disposition to forgive him; and that he in answer thereto wrote another (exhibited) letter, alluding to an arrangement he contemplated making, to provide against a recurrence of this ill treatment to his wife; that shortly afterwards an indenture, dated the 17th of December, 1817, was drawn up, by which that arrangement was carried into effect; and wherein it was amongst other things recited, 'that disputes and differences had existed between the Marquess and his wife, and had arisen to such a height that they were on the point of separating, living apart, and not cohabiting together; but by the intervention of mutual friends the said Marchioness had consented to live and cohabit with the said Marquess after he should have executed the said indenture, and thereby made such provision for their issue, and also such provisional maintenance for his wife, the Marchioness, as therein after mentioned;' and it contained a proviso, 'that in case it should happen that, by a renewal of such disputes and differences, the said Marchioness should find herself compelled to cease to cohabit with her husband, that then such an annuity should be raised by the trustee from the Marquess' estates, as should, by the advice of their mutual friends, be agreed upon to be a proper and sufficient sum for her separate maintenance.'" It further provided, "that a separation was only to take place in case of ill usage or gross abuse from Lord Westmeath to his said wife."

The allegation then pleaded, "a renewal of cohabitation in January, 1818, and a violent menace at Easter, 1818; and that in May, 1818, further articles of separation were drawn up, which were executed on the 8th of August, though purporting to bear date on the 30th of May; that at the earnest entreaty of the Marquess, and by the advice of her friends, the Marchioness reluctantly consented to allow the Marquess to have a separate bed-room in her house; that he still continued frequently to quarrel with and abuse his wife, and used gross and insulting language to her when in the last stage of pregnancy;" it then pleaded "sundry other specific instances of harsh and violent behaviour and lan-

guage; and that by one of such instances happening on the 20th of June, 1819, the Marchioness being very much alarmed and terrified, immediately quitted her house, and sought the protection of her friends; and that since the 30th of May, 1818, being the day of the date of the aforesaid indenture of separation, the Marchioness had not cohabited with her husband, and since the 20th of June, 1819, had wholly lived separate and apart from him."

On this allegation thirteen witnesses were examined; and Lord Westmeath's answers were taken: and on the 14th of January, 1823, a further allegation, consisting of twenty-five articles, and charging adultery with five different persons from the year 1817 to the latter end of 1822, was admitted on the part of the Marchioness of Westmeath, and on it twelve witnesses were examined. (a)

On the 24th of March, 1824, a defensive allegation, consisting of forty-nine articles, with forty-two exhibits annexed, was admitted on the part of the Marquess of Westmeath: the first twenty-five denied or explained the several charges contained in Lady Westmeath's first allegation; the remaining articles contradicted her second allegation. On this allegation twenty-five witnesses were examined. On the first session of Trinity Term the Court admitted an allegation exceptive, first to the credit of one of the witnesses to the charge of cruelty, on the ground that she had negatived an interrogatory, inquiring specifically whether she had made a certain declaration respecting Lady Westmeath's conduct, which declaration it was now pleaded expressly that she had made: and secondly, to the credit of three of the witnesses examined on three out of the five charges of adultery on the part of Lord Westmeath, on the ground that they had been convicted of, and sentenced to fine and imprisonment for, a conspiracy by corrupt means and false oaths to establish that Lord Westmeath had committed adultery with one of the five persons. The copy of the record of conviction was exhibited. On this allegation three witnesses were examined. To these two pleas Lady Westmeath gave in her answers.

The cause came on for hearing in the Consistory Court of London on the third and fourth sessions of, and the by-day after, Michaelmas Term, 1825; on which days the evidence was read; and on the first, second, third, and fourth sessions of Hilary Term, 1826, the cause was argued by *Jenner* and *Phillimore* for the Marquess of Westmeath; and by *Lushington* and *Addams* contra; and on the second session of Easter Term judgment was pronounced.

JUDGMENT.

SIR CHRISTOPHER ROBINSON.

266-99. This is a suit of restitution of conjugal rights brought by Lord Westmeath against Lady Westmeath, in which the citation was taken out on the 11th of April 1821, and returned the 11th of May; and on the 27th of June a libel was given in, pleading the marriage in 1812, and cohabitation till the 14th of June, 1819, when it is alleged, "Lady Westmeath quitted Lord Westmeath's house, without any just cause, and has since refused to live or cohabit with him, though application has several times been made to her for that purpose;" and it concludes with the usual

(a) It will be hereafter observed that the charges, as to three of these persons, were abandoned; and, as to the other two, were held both by the Judge of the Consistory, and by the Dean of the Arches, to be not established.

prayer, "that she may be compelled to return, and cohabit with him, and treat him with conjugal affection."

This is the substance of the original complaint in this cause, which has since branched out into a great variety of particulars. On the part of Lady Westmeath an allegation was admitted in January, 1821, in justification of her conduct, pleading sundry acts of cruelty and insult, and alleging, "that since the 30th of May, 1818, she had ceased to cohabit with Lord Westmeath, under a deed of separation, and that since the 20th of June, 1819, she had been compelled to leave her house, and in consequence of his continued ill usage, had lived separate, and apart." In January, 1823, a second allegation was admitted, consisting of twenty-five articles, pleading sundry acts of adultery committed by Lord Westmeath between the years 1815 and 1822, with several women, viz. Anne Connell, Jane Smyth, Catherine Flinn, Máry Brennan, and Anne Hythe. Those which relate to Anne Connell, Catherine Flinn, and Anne Hythe, have not been insisted on. The charge respecting Anne Connell has been proved to have originated in false information, for which three persons, Anne Connell, Patrick Farley, and John Monaghan, have been convicted of conspiracy, and are now suffering punishment in Ireland. It will not be necessary for me to go into the evidence on those charges which have been abandoned, and without doing that, it would be improper to make any particular observations upon them to the disadvantage of the other parts of the case; but I think I am bound to say, that the information, on which they have been constructed, has been collected or adopted with less caution than ought to have been used in a matter so deeply concerning the honour and reputation of both the noble persons who are affected by it.

I shall proceed, first to examine the evidence on the charges of adultery, according to the order observed in the argument, and also because it will be more convenient for the discussion of the several parts of this case. The first charge relates to Jane Smyth. The remarks, which have been made on the want of caution in collecting the information on which some of the charges of adultery have been founded, apply strongly to the commencement of the history of the connexion with this woman, as it is set forth in the allegation. Things are pleaded relating to the intimacy alleged to have been formed in the family of Lady Glengall, the aunt of Lord Westmeath; to her being pregnant, and being delivered of a child, and to the manner in which Jane Smyth was introduced into the service of Lady Westmeath, which appear to have had no existence in fact. Lady Glengall deposes, "that Jane Smyth never lived in her family;" and that all which is stated on that part of the case is unfounded.

It is alleged, however, in the fourth and following articles of the allegation, that in March, 1821, Lord Westmeath was lodging in the house of a person of the name of Winsor, in Bolton Street, Piccadilly, where he occupied a sitting room, two drawing rooms, and three bed rooms; one for Mr. Jeffries, who was living with him, and two for himself and his servant: "That on a day, in that month, he told Mrs. Winsor he expected an Irish gentleman to visit him, and requested another bed room to be prepared: that this was done accordingly, and on the same day, during the absence of Mrs. Winsor, Jane Smyth was introduced into the house, and her boxes were taken up to her room, which was a back room on the upper story, over the bed room of the Marquess, and not far from the room in which Mrs. Winsor herself slept; that many

indecent familiarities passed between the Marquess and the said Jane Smyth, and on several nights after the family was gone to bed, she staid in the bed room of the Marquess, until two or three o'clock in the morning; that on one night in particular, Mrs. Winsor staid below till one o'clock; that on going up stairs, in passing Lord Westmeath's bed room she heard him and Jane Smyth conversing together; that she afterwards watched, to see when she would go to her bed room, but that she did not do so, and that she remained in Lord Westmeath's room all night, and that she slept with him; that in the month of April, the Marquess having removed to lodgings in Woodstock Street, Jane Smyth frequently called on him there, and they were alone together in his bed room for a considerable time; that she visited him also in the same manner, in other lodgings in Cavendish Street, Cavendish Square, and in Bury Street, Jermyn Street, in January, and April, 1822." These are the acts alleged with respect to Jane Smyth.

The twentieth article pleads "That, in March, 1822, the Marquess being in Ireland at his house at Clonyn, directed Bennett, his servant, to inquire where one Mary Brenan, who was a common prostitute, resided, and sent a message by him and an offer of money if she would come to him at Clonyn House; that she accordingly came on the next day, being Sunday, 31st of March, and was privately admitted by him, and went again, and was admitted in like manner several times, during the following week; that she staid with him alone for a considerable time, and that they then committed adultery."

These are the only specific charges of adultery which have been insisted on. The witnesses produced on the first, are Mrs. Winsor, and Mary Wheaton her maid servant, Benjamin Wall, and Mary Smith; and on the latter, Edward Bennett and Mary Farley.

The account which Mrs. Winsor gives, is, "That the Marquess of Westmeath took her lodgings from the 22d of February, till the 22d of March, 1821; that his uncle, Mr. Jeffries, occupied one of the bed rooms, which he changed for the back drawing room, when Lady Rosa came; that Lady Rosa, being a child of seven years of age, was brought by her governess every morning to see the Marquis; that one morning, after he had been there about ten days, he detained Lady Rosa, and the governess went away without her, though with great reluctance; that on the same day the Marquess came into the kitchen, and desired her to go into Picadilly to get some raspberry jam for Lady Rosa; that deponent wished to send the servant, but he desired particularly that she would go herself; that during the time of her absence, which was not more than a quarter of an hour, a woman (Jane Smyth) was introduced into the house, who was afterwards employed in waiting on Lady Rosa."

The witness seems to consider the manner of this woman's coming into the house, as a feint practised upon her; but her language is not very accurate. She says only "It must have been, she has no doubt, in her absence, that the female came into the house." She did not see her on the first evening, and she did not come down stairs, for two or three days. The servant, Mary Wheaton, says, "Jane Smyth came in the evening." However that fact may be, is not very important, as the Court cannot consider that circumstance as furnishing any inference as to the purpose for which Jane Smyth was brought into the house. It is certain that the primary object must have been to attend Lady Rosa,

and there could be no surprise on the part of Mrs. Winsor in this respect, as when the governess went away, she must have expected some female would come to attend her. There seems to have been no motive for any artifice, and there is no appearance of any such effect being produced on Mrs. Winsor; for she seems to have provided for her as one of the family, without requiring any explanation respecting her; and Carbery says, she ordered him to carry her boxes up stairs, without expressing any surprise, or dissatisfaction to him. The account which Mrs. Winsor gives of the adultery, is, "that she observed no indecent familiarities, but that the Marquess and this woman behaved to each other in terms of great freedom: she never called him 'Lord;' she paid no respect to him as her superior, though she was a very common woman, and not fit to be about Lady Rosa: his Lordship was just as familiar with her, and spoke to her with unbecoming freedom and familiarity: it was not the courtesy of a superior to an inferior, but the freedom and familiarity of an equal." She says, "Jane Smyth came to her room very late sometimes; as late as two or three o'clock; and that on one night, happening about a night or two before Lady Rosa went away (which must have been about the 16th of March), between the hours of one and two, as she was going up stairs to bed, quietly, because it was late, as she passed the door of the Marquess, she heard the voices of the Marquess, and Jane Smyth, in his Lordship's bed room; they appeared to be talking and laughing in a very familiar way. She stopped a moment or two and listened, to be sure that she heard them, and to be sure of the voices; she did not pay attention to them in order to hear what they said, and she does not remember, that she did hear so distinctly, as to have understood what they, or either of them said. She staid but a very short time, a few moments, and all that she can depose, is, that from the sound of their voices, she did distinguish the said Marquess, and Jane Smyth, were talking and laughing familiarly together in his Lordship's bed room. She could not judge from what she heard whether they were in bed or not: she did not hear the said Jane Smyth come to her room, all that night, and knows not whether she went to her own bed or not: she did not watch or listen for her, but being fatigued she went to sleep. Till that night, though she had often thought their conduct improper, and unbecoming in their manner of speaking to each other, it never crossed her mind that any thing of a criminal nature passed between them. Jane Smyth had some dresses, that she was making up, and she thought she might sit up and work at them in Lady Rosa's room: but after what she heard as before deposed, she thought differently, and her belief was, from all she has deposed, that a criminal and adulterous intercourse was carried on between them, and it was in furtherance of it, that she was in his Lordship's room that night." She says on the interrogatories, "that Lady Rosa's room was adjoining to the Marquess'; that they were small rooms with very thin deal partitions; that the door was usually open; that Lady Rosa went to bed about eight o'clock; that the Marquess retired to his bed room about that time, after tea; that he dined at home every day, and spent every evening at home." She gives an account of the position of her own room, and Jane Smyth's, from which it appears they were not adjoining rooms; but that there was a small intermediate room, in which her servant slept. She says, "That she will not swear that she ever saw any indecent familiarities pass between them; that Jane Smyth came to bed

at a late hour, almost every night; that she cannot depose that she knew from what room she came—whether the Marquess' or Lady Rosa's; that on the particular night to which she has deposed, she did not watch whether Jane Smyth would go to her own room." This is the whole of her evidence. Her maid servant, Mary Wheaton, is examined only to the 2d, 3d, and 4th articles of the allegation; neither of which point in any manner to any fact of adultery, and therefore her evidence adds little to the account given by Mrs. Winsor. She speaks only to a woman named Jane Smyth, coming to wait on Lady Rosa, in the manner described. On the 3d, 16th, and 17th interrogatories, she says "she never saw them alone together, or knew of any thing improper, nor ever saw any indecent familiarities between them: she does not know that Jane Smyth ever staid in Lord Westmeath's bed room till two or three o'clock in the morning."

On the effect of this evidence, it is impossible to say, that it amounts to the proof that is usually required to support the charge of adultery. There is no act spoken to which indicates any thing like passion or personal attachment. The woman is described as a very common person, not fit to be about Lady Rosa, and as not possessing any particular personal attractions. The purpose for which she came into the house, was avowedly of another kind. The governess continued to come to the house, backwards and forwards, repeatedly. No suspicion appears to have been excited in her mind, nor in Mrs. Winsor's, till the night shortly before Lady Rosa and the Marquess went away, and on her going away, Jane Smyth was discharged.

The whole effect of this evidence resolves itself into the description which Mrs. Winsor gives of the "talking and laughing" which she heard on the night described, as she was going to bed. That, in itself, is scarcely more than what may be supposed to have passed, according to the account of the familiarity subsisting between his Lordship and this woman, in the many hours that she was attending Lady Rosa in the adjoining room; and though I cannot disbelieve the fact altogether, nor explain it satisfactorily, so as to reflect any credit on his Lordship's prudence or sense of propriety; it furnishes scarcely any inference of an act of adultery at that time committed; it points rather to a habit of intimacy than to any thing specific occurring at that time. As to habitual criminal intimacy, the inference is contradicted by the train of thinking which Mrs. Winsor describes herself to have entertained respecting them; and when I consider the manner in which Mrs. Winsor acted, in not making any communication to her servant; in not pursuing her suspicion, even to the indulgence of the most ordinary curiosity; that she made no complaint to the Marquess, but has acted so as to exclude all confirmation, or test of the accuracy of her suspicions, it would be too much for me to adopt her conclusions as legitimate proof of an act of adultery. I cannot attribute any such effect to it.

But it is said, that it is not on one intimacy subsisting between them that the inference of adultery is founded; that Smyth continued to be in his service till April or May 1822, and visited him at the different lodgings, which he occupied. The only other witnesses who speak to any connexion between the Marquess and Jane Smyth, are Mary Smyth the mistress of the house in Woodstock Street, at which the Marquess lodged for about ten days, from the 27th of April 1821, and Benjamin Wall with whom he lodged in Bury Street, from the 20th of April to the

18th of May 1822, and Carbery, Lord Westmeath's servant, who is examined on Lord Westmeath's defensive allegation.

Mary Smyth says "that Mr. Jeffries had been lodging with her for a fortnight or three weeks before, and continued there some months after the Marquess went away, and had been before a customer of her husband's." She says, that "Jane Smyth's mother washed for Mr. Jeffries; that Jane Smyth came to the house sometimes for the linen for her mother, and at other times when the deponent did not know why she came. She came quite as often when Mr. Jeffries only lodged there, as when Lord Westmeath was there. She does not know that she ever came to see Lord Westmeath; that she always asked for Mr. Jeffries. That she never saw her with Lord Westmeath, and she cannot depose that she ever was alone with Lord Westmeath, or was ever in his apartments." She says on the second interrogatory, "that she told Lady Westmeath in answer to her inquiries, what she has now deposed, and that she thought Jane Smyth came more to Mr. Jeffries than to the Marquess." This evidence is the more important, as it negatives the habitual intimacy which is supposed to have existed between the Marquess and Jane Smyth, as it applies to a period of time shortly after the act described by Mrs. Winsor; and it is perhaps not entirely immaterial to observe, that it was after the commencement of these proceedings when Lord Westmeath must have been apprized that it behoved him to be most particularly cautious with respect to his own conduct.

Benjamin Wall says, "That Lord Westmeath lived in his lodgings from the 20th of April to the 10th of May 1822, that on one day, being either the next day, or the day but one before he left his lodgings, Lord Westmeath, on coming in, about noon, said 'When my maid servant comes, show her up stairs.' That in about five minutes, a female, whom he had never seen before, came and asked if Lord Westmeath was come in; he directed her to the second floor: she went up stairs, and in about an hour afterwards she went out alone. She was about twenty-three, he has never seen her since, and was not up stairs whilst she was there; he does not know that she went into his bed-room; he does not know a female of the name of Jane Smyth; he does not know that any female called on his lordship more than once."

There is nothing in this evidence that applies particularly to Jane Smyth; and it is much too slight to support any suspicion of adultery committed at that time. Carbery admits that Jane Smyth called on Lord Westmeath at Mr. Smith's lodgings, but he does not know that she called at Mr. Wall's occasionally or ever; and I see nothing that identifies Jane Smyth as the person calling on him on that occasion. It is said that he admits there were opportunities on which they might have committed adultery, but he denies strongly all knowledge or belief of the fact; and therefore he cannot be said to assist the evidence which has been relied on in proof of this charge.

With respect to the adultery pleaded to have been committed with Mary Brenan, the witnesses are, Bennett the servant, Mrs. Farley, and her husband; but the last witness's deposition has not been referred to, as he is one of the persons convicted in Ireland of a conspiracy with respect to the charge of adultery with Anne Connell. Of the two former it may be sufficient to say, that they do not speak to any act, or behaviour approximating to proof of adultery; but I think it is due to the

Marquess that the amount of the evidence, on this charge, should be more particularly stated.

Bennett says, "That he had lived many years in the service of Lord Westmeath; that in the end of March or beginning of April 1822, the Marquess asked him if he knew a girl of the name of Mary Brennan, who had lived with the widow Wren, and had a child by her son; that he desired him, to go and tell her to come to him, and he would give her a guinea, and if any body asked where he was going, he was to say he was going to see if there were any wild fowl on the locks. That he went, and thinking that he knew what his lordship wanted, he gave her an idea of the business, and she refused to go, and would by no means go with him." This does not very well agree with the description of this woman as a common prostitute. "He then returned, and told Lord Westmeath who seemed disappointed, and asked, 'how he could get her to Clonyn.' He replied 'that if he sent her word that he wanted to see her about Wren, and that he would make him marry her, she would be likely to come.' That he did so, and she agreed to come the next morning at 10 o'clock. The deponent did not see her then: he met her between 11 and 12 o'clock going away to mass; he saw her at Clonyn the next day, on Monday, and Wren was with her; Lord Westmeath told him afterwards 'that the girl had been crying to him to make Wren marry her; but I can't make him, or I can't do it for her.' Excepting what he has deposed, he does not know that they were ever together. He cannot depose that he believes the Marquess did commit adultery with Mary Brennan. He does not know that she is a common prostitute; she had a child by Wren, being a single woman, but he knows nothing more against her than that."

This is the substance of his deposition. In his answer to the fifty-third interrogatory he says, "That he did not tell Mary Brennan, that Lord Westmeath would give her a guinea, though his Lordship had told him to tell her so. That offer was not made, though Lord Westmeath had authorized him to make it." What he means by giving her an idea of "the business" on which Lord Westmeath wanted her, as he had said before, without mentioning this chief inducement, is not very intelligible; and, I think, it is very probable that what he has said about "that business," as he calls it, is entirely an invention of his own. The facts that are stated respecting her going to Clonyn, show clearly that she had another object in going there, and do not in any manner support that part of this man's evidence.

Mary Farley says, "she never saw Mary Brennan before the Sunday: all that she saw then was that she was in the yard at ten o'clock: how long she was there, or what she came for, or whether she was in the house, or in company with the Marquess she cannot say. She saw her there again on the Monday about ten o'clock with a young man of the name of Wren, and also Wren's uncle: they were there about half an hour; neither of them went into the house. She watched them on that day, but not on the Sunday. She only just saw Mary Brennan enter the yard, and that was all; she does not know that she was a common prostitute. She never heard that of her."

Carberry and Michael Beatty, who have been examined on the defensive allegation of Lord Westmeath, admit that Mary Brennan came to Clonyn on the Sunday morning; but Beatty swears "that he heard Lord Westmeath ask her what she wanted: she seemed to be telling her story,

and he heard Lord Westmeath tell her he could give her no summons then, and he desired her to send Wren to him the next day." He says "she was then but a few minutes talking, and, as he believes, in the passage all the time." Wren also speaks to the fact of going on the Monday or Tuesday with his uncle and Mary Brennan, in consequence of her complaint to the Marquess, and in obedience to his Lordship's orders or summons. The complaint, therefore, must have been made on the Sunday morning, when, Beatty says, the orders were given to attend the next day.

It is clear from all the evidence on this part of the case, that the Marquess had an honourable and meritorious object in his mind, as one reason for sending for Mary Brennan. As for any purpose of criminal gratification, there is no evidence but what rests on the inconsistent account given by Bennett. This man, though in the confidence of his Lordship, according to the first part of his evidence, does not pretend that Lord Westmeath told him that any thing of that kind had actually passed, though he speaks to a declaration, "that he could not effect his object of inducing Wren to marry her."

Nothing which has been said by these witnesses, or by any other, supports the representation of gross or habitual profligacy against Lord Westmeath, which is the colour and complexion of the charges in the allegation. The description of Mary Brennan, as a common prostitute, is completely negatived. She had been confined not long before this transaction is supposed to have taken place; as Patrick Farley says "it was at the end of 1821, or beginning of 1822, that she left place to lay in, for she was far advanced in pregnancy." She is anxious to be made an honest woman as it is called, by marrying Wren. Lord Westmeath was also solicitous to effect that union; yet he is represented to have been basely adding to her injuries, and heaping disgrace on the man whom he was endeavouring to persuade to do an honourable act by making all the amends in his power to an injured woman; and this on the very eve of his departure for England on the Wednesday following. I think this imputation on Lord Westmeath is not in any manner credible.

It may be proper to advert also to what is the account which is given by Patrick Farley, who, as I have said, has been convicted of a conspiracy on another charge. He says, "he was steward to Lord Westmeath; that on the 30th of March, having occasion to find fault with Bennett for neglecting his work, Bennett mentioned to him the message, which he had carried from the Marquess to Mary Brennan: at first he could not believe it, but he repeated his statement, and added she was to come to-morrow at 10 o'clock. That he then determined to watch her himself in the stable opposite his Lordship's study window: in a few minutes he saw Mary Brennan coming towards the house, across the lawn, his Lordship then opened a door leading to the lawn, admitted Mary Brennan, and took her into his study; that he went up to the window about ten minutes after they went in, and saw them on the floor, in the act of adultery; that he went away immediately to his business in the yard, and about three quarters of an hour afterwards, he saw his Lordship let her out, in the same manner that he had admitted her; that he saw her again at Clonyn on the Tuesday, coming out of the house with young Wren; that Lord Westmeath put on his greatcoat, came out of the house, and followed her very carelessly, but how far he cannot say." This is an account which might agree very well with the gross

and habitual profligacy charged in the libel, but I think it does not accord with any view which the Court is warranted to form as to his Lordship's conduct, or with the evidence, which I have before stated, respecting Mary Brennan's habits, her positive rejection of the first offers that were made to her, and the avowed object of her interview with Lord Westmeath. I make this observation, not to reject the testimony of this man, because it has not been relied on, but to justify the opinion which I feel myself bound to express, not only that the charge of adultery with Mary Brennan is not proved, but that the whole surmise of such a purpose, so far as it rests on that part of Bennett's evidence which cannot be contradicted, except by Lord Westmeath himself,—and his answers on the second allegation have not been called for, is not deserving of any credit.

I come, now, to the charge of cruelty, alleged on behalf of the Marchioness, in her first plea, as her justification for not returning to the society of her husband; and in so doing, I shall examine the facts, as they are to be collected from the evidence, without defining *a priori* the principles of law to be applied to them. I have prescribed this rule to myself, in order that I may avoid the danger of appearing to bend my view of the evidence, in the slightest degree, to any standard of principle so assumed.

I have been under the necessity of abstracting the evidence, for the most part, from the voluminous bulk of the papers, and the disconnected arrangement of the several parts, but I have endeavoured to do it principally in the words of the witnesses, and, if I should appear to be inaccurate in any part, I shall hope to be reminded of it.

The allegation pleads in substance, "the marriage in 1812, and cohabitation at different places, first in August 1812, at Black Rock, near Dublin, when it is stated the Marquess began to treat his wife with great cruelty and harshness; that he frequently quarrelled with her without just cause, and on such occasions behaved to her with great violence, and used the most coarse and insulting language; that in January 1813 they returned to Hatfield House, where, shortly afterwards he quarrelled with her, and abused her in very opprobrious language in the presence of Sarah Mackenzie, and that in order to conceal the same from her family, she desired Sarah Mackenzie not to mention it to any person."

Sarah Mackenzie denies altogether any knowledge or observation, of improper behaviour at Black Rock; she says "she neither saw nor heard any thing particular, in her presence at Hatfield; but having observed, that at the Black Rock the Marchioness was dull, and apparently unhappy, and also at Hatfield, seeing there was a coolness between them, and that Lady Westmeath was unhappy, she took an opportunity of speaking of it to her Ladyship, and lamenting it; that Lady Westmeath referred it to the behaviour of Lord Westmeath to her, but begged her not to mention it: she gave no reason for saying so, but only desired her not to mention it." No other witness speaks to this period.

The sixth article pleads, "the return to Ireland, in May, 1813, to the Earl of Westmeath's House at Clonyn. That during their residence there, and about the end of that year, the Marquess took possession of her pin-money, and refused to supply her with money to defray the necessary expenses, that he kept her destitute of money for several months together; that when she applied to him for money he flew into a violent passion, and behaved to her with the greatest brutality, that he used the

most opprobrious language, swore, and called her a damned bitch, and threatened that he would kick her to hell, and beat and kicked her with great violence, so that she was much bruised thereby and suffered great pain."

Sarah Mackenzie is the only witness on this article. She says, "she was in the situation of lady's maid and housekeeper." She deposes to a great want of money, and describes in strong terms, the privations which the Marchioness suffered on that account. But she knows nothing of the Marquess' means of supplying her with money; and therefore the Court can draw no inference from that circumstance. It is stated by Counsel, that their income was something more than 2000*l.* per annum; and there is certainly no appearance of extravagance in the description given of their manner of living. It is suggested that the money was misapplied to other objects; but there is no proof on that point from which the Court will be justified in drawing any particular conclusions.

Sarah Mackenzie goes on to say, "that when Lady Westmeath asked his Lordship for money he abused her: he never abused the deponent, but she has heard him abuse Lady Westmeath on such occasions; she has heard him call her 'a damned bitch,' and say that he would 'kick her to hell;' he put himself into the most violent passions: he was more like a madman than a reasonable being; she never saw or knew of any provocation that Lady Westmeath gave him; she wished for a quiet life, and the deponent has known her to leave the room to avoid any thing unpleasant when he was inclined to quarrel; Lady Westmeath is a quick tempered woman, and when irritated she would show it, but she was never inclined to quarrel, and never began by giving any provocation, to the deponent's knowledge. The deponent never saw Lord Westmeath beat or strike Lady Westmeath, but she has seen marks of violence on her, and knows that he did beat her as she will depose." She speaks again of the want of money, and says "that Lady Westmeath was obliged to cut up her own body linen, to make some for her child; that he would be kind to her at times, but then his passion got the better of him, and his evil disposition, and he would quarrel with Lady Westmeath, as though it was for the sake of it, and he behaved like a brute to her; though she bore so much for him he did not take common pains to provide her with such comforts as might have been had, and deponent can truly say that her ladyship's life was then only wretchedness. She cannot depose more particularly to words of abuse which she has heard Lord Westmeath use towards his wife, but he would curse and swear at her many times."

I have stated this woman's evidence thus much at length, because it may be necessary to say a word or two as to the credit which is due to her: she has been described as a prejudiced witness; she appears to have been much in the confidence of Lady Westmeath, to have obtained a situation for her husband from Lady Westmeath's influence, and to have been employed in providing for some of the Irish witnesses, during their stay in England, for several months. There is the less occasion, however, for the Court to be minute in estimating her credit, because the counsel on the other side have admitted, that they rely on her only so far as she may be confirmed by Lord Westmeath's letters, or other evidence. That certainly is a very fair criterion. It may be fit that I should say, however, on the general character of this person, that I see nothing to impeach her credit: she had been a very old servant in

Lord Salisbury's family, and had gone to live with Lady Westmeath on her marriage: she appears to have obtained some degree of respect from Lord Westmeath, as there is one instance of a message from her, in one of Lady Westmeath's letters, that implies at least a favourable acceptance of it on the part of his Lordship: but I think the evidence which I have read is liable to some exception on account of the very general terms in which it is expressed.

She describes, so far, no particular incidents, but rather her own conclusions, drawn from an indiscriminate reference to indefinite periods of time. For although the subject of the sixth article is confined to the events of 1813, and particularly the close of that year, it is evident from what she says of Lady Westmeath cutting up her own linen for her child, that she has gone forward and anticipated many things, of which in her own words, "she is hereafter to depose"—being things that happened after the confinement of Lady Westmeath in May, 1814. None of the witnesses on Lord Westmeath's allegation refer to this period, except Dr. Barlow, who was examined as to the state of Lady Westmeath at that time, but on which he has nothing very particular to say. I have looked over the letters of this period, which are the first fourteen; and it is admitted that they contain no complaints; perhaps they go a little further. No. 13, on the 31st September, 1813, contains minute calculations as to domestic expenses, in the most free and affectionate terms, which are scarcely reconcileable with the supposition of any hardships or injury sustained by Lady Westmeath, at that time, on account of Lord Westmeath's misapplication of the common funds; for in No. 14. which is of the 3d November 1813, she rebukes him for unnecessary anxiety about her health; she says, "My health is as usual, why so ready to accuse me of wishing to torment you?"

It has been said of the letters, that they give but a very imperfect view of the state in which the parties lived, as they are selected from favourable periods. That is true undoubtedly, as to other periods; but it is to be recollected, that, in this allegation, the disputes are said to have prevailed in the first year of the marriage, though they have not been proved, or insisted on: and for the purpose of contradicting that part of the charge, these early letters are not immaterial.

I have now gone through the first eighteen months or two years of this inauspicious marriage; and the statements as to this period must be pronounced to be not supported by any proof. I come next to a more specific act of violence, charged as happening about the time of the Marchioness' first confinement—in April or May, 1814.—That is described in the argument as the first act of violence. It is pleaded in the seventh article of the allegation, that "on a night, happening in the month of April, 1814, the Marquess, without any cause or provocation, after they had retired to rest, quarrelled with Lady Westmeath, who was then near to her confinement, that he used violent language towards her, struck her several blows, and kicked her on the side, by which she became extremely ill and suffered great pain; that being alarmed at her manifest illness, he then called up Sarah Mackenzie to her assistance; that she declared to Mackenzie in the presence of Lord Westmeath, that her illness was occasioned by his having beaten and kicked her, and he admitted that he had done so."

The account which Sarah Mackenzie gives of this act is nearly in the words of the plea: she says, "she was called up about four o'clock; that

on entering Lady Westmeath's chamber, she found her in bed, and Lord Westmeath standing in his dressing gown; that she asked Lady Westmeath if she was taken ill? Lady Westmeath said, 'that Lord Westmeath had beaten and kicked her, and she was in very great pain.' He said, 'Emily, you provoked me to do it.' Lady Westmeath looked at him but said nothing. She then asked the deponent why she had come, and bid her go to her own room again. Lord Westmeath appeared to be frightened."

This is the whole of her evidence, and there is no confirmation of this account by any other witness. Elizabeth Kernan is examined, on Lord Westmeath's allegation, to contradict it by proving that she knew nothing of it; but it is doubtful whether she was in the house on the particular day. She speaks, however, of the manner in which they lived together, during the time that she lived in the family—from the middle of April, 1814, for nine months. She speaks very respectfully of Lady Westmeath, and appears not to depose under any prejudice against her: she says, "She had frequent opportunities of knowing and observing how they lived together, she never saw him behave with violence or unkindness, and that she never saw a happier couple." Mary Macarthy, who was the monthly nurse, and commenced her attendance in May, and Dr. Barlow, the medical attendant on Lady Westmeath in her confinement, speak generally to the same effect. The utmost, therefore, that the evidence on this article can prove, if taken without deduction, is only the admission of some act of unbecoming violence on the part of Lord Westmeath; but it does not show the circumstances attending it, by which the Court may be enabled to form an accurate judgment of the nature or extent of the injury inflicted.

Amongst the letters are two which were written on the 18th and 19th of April, they are filled with domestic occurrences; and in another letter of the 9th of August in the same year, which has been the subject of observation, there are chidings for too great a solicitude to hear from her; and in it there is the expression, "You know when we are friends, I never omit to write." But it would be straining the interpretation of those expressions too much to suppose, that they referred to any such causes of disagreement, as are described in this article.

The next article describes the use of intemperate language, rather than an act of personal violence during the confinement of Lady Westmeath; he is represented to have abused her for not suckling her own child, asking "Why the devil she could not?" and to have refused to procure a nurse, and to have threatened at the same time to disinherit Lady Rosa, and settle all his property on his brother. On this article there is no witness examined who was present at the time. Sarah Mackenzie does not speak to it. The nurse and Dr. Barlow strongly contradict that part which relates to the refusal to procure a wet nurse, for two were actually procured, and it appears clearly that previous arrangements had been made for that purpose. If any words were used of the import of those pleaded, they could only have applied to the short time which might pass before the second nurse could be procured to supply the place of the first, who was dismissed as insufficient. There would have been no proof of violence on this charge, if it had not been for the recital of it by Lady Westmeath, in the presence of Lord Westmeath, in the interview described in the evidence of Mr. Wood. The silence, or want of denial of the charge at that time, on the part of Lord

Westmeath, implies that something had passed, as may be collected also from the manner in which the eighth article is counterpleaded and explained in his responsive allegation. I shall have occasion to read Mr. Wood's deposition on the following charges, and will not stop to advert to it now, as it does not, I think, substantially prove any thing like a malicious or determined purpose to expose Lady Westmeath to inconvenience in any thing that passed relating to the suckling of the child:—it relates at most to the indulgence of a pettish and peevish spirit, and of intemperance of speech, of which there are but too frequent indications, and perhaps on both sides, in the history of these parties.

Mr. Wood describes the threat of disinheriting Lady Rosa, to have been referred to the time of the confinement; and Lord Westmeath admits that something of that kind passed, which was undoubtedly very harsh and unkind, particularly at that time; but the notion of disinheriting an infant daughter, in favour of a brother, when there was a prospect of a numerous issue of sons and daughters, was an extravagant suggestion, and could only have been a transient threat, uttered without any serious meaning, and I should imagine without effect in occasioning apprehension or anxiety to Lady Westmeath.

I approach, now, to a period, which appears to me to present greater difficulties. On the former part of the case, to which I have hitherto adverted, I have expressed my reasons for considering the evidence in support of the several charges to be defective, either in substance or in certainty. But on the facts pleaded to have occurred between the summer of 1814 and December 1815 inclusive, I am bound to confess that I think the result of the evidence is of a different character. It relates to the matters pleaded in the 9th, 10th, 11th, 12th, and 13th articles of the allegation, and is spoken to by eye witnesses; it is explained, or palliated, rather than contradicted, in the counter allegation, and it is confirmed by the admissions, on the part of Lord Westmeath, in his own letters, and in the expressions which are attributed to him in the deposition of Mr. Wood.

The account, given by Sarah Mackenzie of the occurrence pleaded in the 9th article, is, "That in July or August 1814, they went to dine with the Earl of Westmeath in Dublin, intending to go to the play. Lord Westmeath came home early, ordered horses to be at the door the next morning, and the deponent to pack up Lady Westmeath's things. They returned home late, and Lady Westmeath being informed of what had been done, said that she was not to be spirited out of the town in that manner: the deponent saw something had been amiss. At an early hour the next morning Lord Westmeath came to the door of the adjoining room, called her up, desiring her to go and ask Lady Westmeath to forgive him, as he had often done; but Lady Westmeath had fastened her door, and they stood as long as an hour and a half; he begged her to let him in, and promised that he would not beat her any more; at last she opened the door and he went in. In a little while she heard Lady Westmeath call 'Murder;' she went in, and they were both out of bed, and he was about to strike her, which she prevented. He was swearing and abusing Lady Westmeath, and talking so fast, that she could not well know what he said. Lady Westmeath said he had been beating her, which he did not deny. She prevailed on them to go to bed, and left them; and, as she says, the next morning, Lord Westmeath himself procured a lotion which was applied to her breasts for

several days, as she was much bruised, and they were fearful it would end in a cancer. This fact, as to the procuring the lotion, he himself admits.

The tenth article of Lord Westmeath's allegation states this matter a little differently; but does not substantially contradict it. It alleges "some provocation in the abrupt return of Lady Westmeath from his father's house, before dinner, whilst the company were assembled in the drawing room, to Leinster House, where they were residing; that he followed her in order to prevent a repetition of such conduct: he determined to leave Dublin the next day, and gave the orders for packing up," as described by Mackenzie, "but soon afterwards countermanded them; that in the evening the Marchioness having been informed of such orders became very much exasperated, and for several hours, and until day-light refused to permit him to come to her chamber; that she used gross and insulting language, and finally, in order to prevent a continuance of such abuse, he placed a pillow over the face of Lady Westmeath who was then in bed, but he did not attempt to smother her, nor had any intention to injure her, but instantly took it away again." On this statement I have to observe, that it does not fill up the whole time to which it refers; and of the two statements I must confess that of Mackenzie appears to be more natural and credible. Lord Westmeath admits the placing the pillow over the mouth of Lady Westmeath; that she called out, and Mackenzie came into the room; but he denies the striking and the other parts of that charge. There is no witness examined on that part of his explanation, which relates to the previous circumstances that led to this dispute; and might be capable of proof. The act of placing a pillow over his wife's mouth, by force, and in such a manner as to make her scream out for assistance, was in my opinion a most violent act; it was a most unfortunate act, to say the least of it, in this respect, that it is almost incapable of being justified by any explanation whatever, coming only from the party himself. A further test of the truth of the evidence of this act will be found, I think, also in what is admitted by the Marquess as to procuring the lotion, and the reference to it at the meeting described by Mr. Wood.

The eleventh article pleads a disturbance of a similar kind, occurring in October or November 1814, in the middle of the night, at a visit at the Duke of Leinster's seat; but on this charge the evidence of Sarah Mackenzie is not so distinct: she does not specify the time further, than as being between August 1814, and the journey to France in December 1815; she says only, "that she was awakened by Lady Westmeath running into her room, followed by Lord Westmeath: she was flying from him, and he was endeavouring to induce her to go back, saying the servants would hear them, but he did not otherwise make any promise of good conduct in future, nor did he express any sorrow for what he had done. Lady Westmeath appeared very much frightened, but she does not know that she was hurt. They returned to their room:" and she speaks to the confusion in which she found it; "the water had been emptied into the fire: the bed was in confusion, and the clothes." There is no appearance of exaggeration in this account, as it does not go quite so far as the facts pleaded. It closes the evidence of this woman, and I think in a manner not unfavourable to her general credit. What she says afterwards about Lady Westmeath's health, in attributing it to the ill usage she received, is less material, as the fact is admitted in

the adverse plea, that she was in a low and nervous state of health, though not owing to such a cause; and if there is any truth in the conclusions which I have drawn from the facts of the case, it is impossible that they should have occurred without producing some effect on her spirits, and as may be presumed also on her health.

I come now to read the deposition of Mr. Wood, against whom strong exceptions have been taken with respect to his credit, on account of the enmity which he is represented to bear to Lord Westmeath. He appears to have been formerly a friend of the family, and to have been so treated; but it is said that Lord Westmeath has been in confinement, in the King's Bench, at his suit, since 1819. That cannot have proceeded solely from malice on his part; nor do I see reason to suppose that a gentleman of respectability, as he appears to have been, would so far forget the obligations of his oath, or his honour, as to be influenced by any such considerations, in the testimony that he may be called upon to give in a Court of Justice. It is said also that he has shown a disposition unfavourable to Lord Westmeath, in the part which he has taken in reading the allegation of Lady Westmeath to his daughter, observing on the parts to which she could speak. I shall certainly be on my guard against placing too much reliance on any witness in a cause of this description; but I see no reason to reject, or substantially to disbelieve, the testimony of this gentleman, or of his daughter; and I will here also dispose of the exception which has been taken to her evidence. It is founded on a conversation with Mr. Giles at a ball, and the circumstance that she did not recollect it when put to her on interrogatory. The substance of it was, that Mr. Giles asked her in familiar conversation, and as a friend to Lady Westmeath, what Lady Westmeath was about, in resisting Lord Westmeath in his proceedings in Chancery. She replied, "Lady Westmeath had always succeeded in getting what she wanted by bullying him, and she supposed she was doing the same now." She has denied that she used such words, and has sworn she did not know to what conversation the interrogatory could allude. Mr. Giles, in his examination on the exceptive plea, disclaims any imputation on her credit from this denial; as he says from the tone and manner in which the conversation passed, it is probable Miss Wood might not recollect it. Both Mr. Wood and his daughter have enjoyed the confidence of Lord Westmeath; and all they know relating to this case has arisen out of that confidence. The manner in which Mr. Giles addressed himself to Miss Wood, in the conversation relating to Lady Westmeath, shows that he did not treat her then, as a prejudiced person; and with these observations I will proceed, cautiously, certainly, but not with distrust affecting their general credit, to examine the evidence of Mr. Wood and his daughter.

Mr. Wood speaks to no particular act of cruelty. He says, on the 10th article, "That after the death of Lord Westmeath's father, in the latter end of 1814, they came to Dublin, and the intercourse between them and the deponent's family was then continual. Lady Westmeath was then in a weak and nervous state, and entertained apprehensions of a consumption; she was attended by Dr. Hervey and Dr. Percival, who are since both dead. He says that he witnessed no aggressions, but he was repeatedly solicited by Lord Westmeath to intercede for him with Lady Westmeath; that in September 1815 he was a fortnight in Dublin, and saw them frequently. On one occasion, at the Waterford Hotel,

there was a serious misunderstanding between them. Lady Westmeath was threatening that she would proceed against his Lordship for a separation, or rather was making a declaration of the necessity of such a step; that she enumerated various instances of ill treatment and cruelty, the principal features of which had been acts of violence, which had not been the subject of previous interference on the part of the deponent. That he remembers particularly she complained of his treatment during her confinement, his threat to disinherit Lady Rosa, and his discontent and anger at her for not nursing her child, but she mentioned he had beaten her several times, and particularly at Leinster House; and also upbraided him for not making the settlement on the children, as he had promised to do, on the death of his father. During that time he was walking about the room apparently annoyed by the recital, and striking his head occasionally; but he acknowledged distinctly the truth of what she said: he denied nothing; he did not recriminate nor accuse her; he appeared to be sensible of the impropriety of his conduct, and expressed his regret and contrition, and promised to make amends and that he would never repeat his ill treatment of her. That on this assurance a reconciliation took place, and he left them reconciled.

This is the substance of his deposition in chief: he speaks to no act of cruelty committed in his presence; but he heard much on the occasion described. Interrogatories are addressed to him, which suggest other causes of disagreement, rather than imply any contradiction of the existence of unhappy differences between the parties; but the witness adheres firmly to the above account, and positively asserts that Lord Westmeath acknowledged that he had been guilty of personal violence to Lady Westmeath by actually beating her. The effect of this however alone is not very precise; it goes principally to confirm the accounts of other witnesses, and supplies a test by which the Court may judge of the real state in which the parties were living, so much at variance with many parts of the correspondence which have been exhibited.

That correspondence has been opposed to the credibility of this account; and the attention of the Court has been particularly called to No. 22 and No. 23, being letters written by Lady Westmeath on the 7th of April, and 19th of August 1815; and it is said, that the discussion must have related to the settlement of Lady Rosa, rather than to any enumeration of grievances, or to any mention of a separation, and that it is incredible that any thoughts of separation should have been entertained at that time. The allusion to a separation occurs however previously in that letter; and in one before, which is dated on the 3d of April; and therefore that observation is not founded. In the thirteenth article of the Marquess's allegation also it is said, that the meeting was for the purpose of discussing the propriety of making the settlement on Lady Rosa; that the differences and disputes and disagreements, referred to at the meeting, related to two natural children which the Marquess had before marriage, and to no act of unkindness, and it was, on this subject alone, that he expressed his regret that any such disagreements should have arisen. We have the fact however of such a meeting, and of the temper prevailing at it fully established; and the only question is as to the immediate subject of the disagreement. Considering the temper of the parties, it is probable that any disagreement, however originating, would not be confined to one topic: and I collect from Lord Westmeath's answer that the complaint became eventually more general.

The sentiments of affection and kindness, which the letters exhibit, are not more at variance with the supposition of disagreements of one kind than of the other. I think, therefore, that this charge is by no means effectually repelled.

The next act of cruelty is that alleged to have been committed at Granvilliers, on the journey to Paris in December 1815. The thirteenth article of the allegation charges, very summarily, that on that occasion "he abused the Marchioness and swore at her in a most outrageous manner, and then struck her a most violent blow with his fist, pushing her at the same time with much force, so that she would have fallen on her head in the fire-place, if she had not been caught and prevented by Miss Wood." The witnesses who speak to this fact are Miss Wood, and the servant maid, Janet Service, who were the only persons present.

They differ a little in circumstances. Miss Wood says, "that Lady Westmeath, herself, and the servant, were in the bed-room, and that the door was not opened immediately for five minutes, to Lord Westmeath, but that the delay was unavoidable." The servant says, "she came up stairs with Lord Westmeath, and the door was opened immediately on his knocking." Miss Wood says the blow was on the upper part of her breast near the shoulder. The servant says it was on the lower part of the back. They both agree that they came late to a bad inn at Granvilliers, and Lady Westmeath complained, in the hearing of Lord Westmeath, though not to him, that it was more like a brothel than an hotel. The expressions used to him were only "What a place is this you have brought us to." Miss Wood does not even speak to any conversation, but she says, "that Lord Westmeath came into the room with wood for the fire: that her back being turned, she did not see what passed, but heard a blow given by Lord Westmeath, which would have knocked Lady Westmeath down, if she had not caught her: that he exclaimed at the same time, 'Go to hell, I wish I had never seen you.'" Service says, "the blow was struck in consequence of the question asked by Lady Westmeath—'What place is this you have brought us to?' It was about the small of the back that he struck her, and the blow seemed for a time to take away her Ladyship's breath." No further account is given of what passed afterwards, except that Lady Westmeath retired into the inner room, in which Miss Wood slept, and staid there till five or six o'clock in the morning, when by the persuasion of Miss Wood she returned to her own room, and it appears they went on to Paris the next day.

It is not denied in argument that something of this kind occurred, but no satisfactory explanation is given on the part of Lord Westmeath, of what actually passed. From the different accounts given of the part of the body on which the blow was struck, by Miss Wood and Service, I may infer that it was not so violent as to occasion bruises, or to leave any visible marks; but I think I am bound to conclude from the evidence, that violence was used on that occasion, and that a blow was given, either with the fist, or with the open hand, as seems to be suggested, which was unjustifiable. Miss Wood and Service say they did not witness any other act of violence, nor any other instance of gross or abusive language in France, though they describe the general temper of Lord Westmeath to be very irritating and blameable in their opinion. They attribute the illness of Lady Westmeath at Paris, to the effect of this conduct. In this, however, I think they betray a little of the exaggeration which

usually accompanies the testimony of partial witnesses: for they admit particular instances of great attention and kindness in the behaviour of Lord Westmeath to his wife during her illness, and witnesses examined, on the part of Lord Westmeath, as to the manner in which they lived in Paris, describe Lady Westmeath to have been much in society, and in general good health and spirits, taking the diversion of hunting, and partaking of all other amusements.

On this review of the evidence respecting the scene at Granvilliers, I should be glad enough to make any deduction in the evidence of the two witnesses, on the score of partiality, if I knew where I was to stop; but being furnished with no explanation that appears to me more satisfactory, than the account given by these witnesses, I think I am not warranted entirely to disbelieve them. Lord Westmeath himself admits, in one of his letters, occasional intemperance of speech on other occasions, and particularly that he had threatened "to turn Lady Westmeath out of doors." The same threat is complained of by her in her letter marked thirty, though I do not perceive that, in that letter, she adverts to his behaviour at Granvilliers. The expression is not, therefore, so incredible, or irreconcilable to the habits of Lord Westmeath, as I might have expected. On the whole of the evidence applicable to this part of the case, I do not feel myself at liberty to disbelieve the account given by Lady Westmeath's witnesses, and if that is believed, there can be but one opinion of the impropriety, and, I think, of the legal character of the act of violence described to have been committed, on this occasion.

They staid about nine months in Paris, and afterwards went to Spa, and returned to Ireland about the end of 1816. Nothing particular occurred during that period. The fourteenth article charges "violent conduct and gross and opprobrious language, on an occasion happening in December of that year, when they were proceeding to embark for England." Janet Service is the only witness examined on it. She says, "they came down in the carriage to embark; Lord Westmeath being on the box: he was for going back as it was too rough: Lady Westmeath said it would be better to inquire if there was any danger; he would not attend to her, but put himself in a great passion, and ordered the coachman to drive back. Lady Westmeath said, 'Will you just hear me for a moment—only just hear me,' on which he became quite furious, and ordered the footman, who was down waiting at the door, to get up again, and pay no attention to her, saying, 'he was master and would be obeyed.' He was much vexed, and seemed as if he would have struck her, or pushed her down in the carriage; deponent was alarmed for the child and cried out. Lady Westmeath sat down, and the carriage drove back to Dublin." On this statement, which has the appearance of being rather inflamed, it was an accidental occurrence growing out of his anxiety for their safety, according to the judgment which he had a right to form of the danger of embarking at that time. There was no actual violence, nor any threat or opprobrious language which the witness is able to describe. The witness says, "it was bad enough at other times, when the witness only was present, but she thought it much worse on this occasion, because the men-servants were witnesses to it, and it was insulting and degrading Lady Westmeath before them." Her comments on this occurrence bear the appearance of being overcharged; and however much the description may keep up the colouring as to the hasty and intempe-

rate habits and manners of Lord Westmeath, it states no acts of personal violence, and adds very little to charges of actual cruelty.

I now come to a part of the case, which is rather of a novel kind. The fifteenth and following articles relate to a series of negotiations, and acts done, in effecting a voluntary separation between these parties, which exhibit rather an extraordinary specimen of matrimonial law. There is a continual charge of frequent quarrelling and abusive language, but the specific acts that are pleaded are very few, and of those some are not proved. They plead "That in consequence of the aforesaid ill treatment, Lady Westmeath in the summer of 1817 again declared her intention of applying to the laws of her country for protection, but agreed to abandon such intention, on his proposing to execute a deed of separation; and instructions for such an instrument were accordingly given to Mr. Sheldon; that in October in that year, Lord Westmeath, being in Ireland, expressed his contrition for the cruelty of his aforesaid ill conduct towards her, in sundry letters," that are exhibited: "that Lady Westmeath being moved by such letters expressed a disposition to forgive him, and he promised to execute a deed to provide against any recurrence of his ill-treatment." A deed was accordingly executed in December, 1817, for a separate maintenance, and which is also exhibited. "That they thereon lived and cohabited together: that about Easter, 1818, he renewed his ill-treatment; she complained to her friends, and implored their interference that legal measures might be adopted on her behalf to obtain a separation: that a meeting took place between Mr. Sheldon, Mr. Stevens and Mr. Wood. The draft of articles of separation was prepared in May 1818, it was delivered to a stationer to copy; Lord Westmeath obtained possession of, and destroyed it." The conduct of Lord Westmeath in attempting to destroy that agreement has been the subject of strong and severe animadversion in the argument, but that is not strictly a point in the case which I have to determine, and therefore I shall not advert to it further than as it is an incident in the general history of the parties. It has not been the practice of the Ecclesiastical Courts to consider such agreements as affecting in any way the legal relation of the parties:^(a) and therefore, a breach of such an engagement can hardly enter into the strict and accurate examination which I am bound to take of the evidence, as it may support the charge of cruelty. Another draft, however, was prepared and executed in August following, making a separate provision of 1300*l.* per annum for Lady Westmeath, and containing the usual engagements not to require cohabitation, or to resort to the process of the law for that purpose. During the whole of this time, from the summer of 1817 to August 1818, no specific act of cruelty is pleaded, except one about Easter, 1818, occurring at Hatfield, in which Lord Westmeath is described to have seized a poker and to have brandished it over her head *threatening to kill*

(a) In *Smith v. Smith* (Consistory, 1781,) in a suit by the husband for restitution of conjugal rights, the wife pleaded articles of separation with a clause that the husband should not proceed in the Ecclesiastical Court. This plea however was overruled, and the Court (*Dr. Wynne*) observed, "that it believed it was the first time the question had come directly before it, and was surprised that it should be brought forward." That case was cited by the same learned Judge in *Fletcher v. Fletcher* (Consistory, 1786,) where, on a suit for restitution by the husband, the same point was raised, and decided on the authority of the former case. And the principle of those decisions has been acted upon in subsequent cases. See further upon this subject, *Roper on the Law of Husband and Wife*, vol 2. c. 22. 2nd edition.

her." But on this charge no witness is produced. Sarah Johnson lived with Lady Westmeath from June 1817; but she speaks to no specific act at the time. The Marchioness of Salisbury expressly denies that Lady Westmeath made any complaint to her of the violence described in this article.

The letters of Lord Westmeath, which form the introduction to this part of the case, are seven in number, written from Ireland in the months of September and October, 1817. They are written in a very impressive strain of the deepest and most intense self-humiliation, to an offended and injured woman. They ascribe to Lady Westmeath the character of an affectionate wife, and many excellent qualities, and, in so doing, remove from her much of the blame of this unhappy quarrel. The terms are general, however, in most parts, and for that reason not very distinct in their application; No. 5, acknowledges that he threatened to disinherit Lady Rosa, and turn Lady Westmeath herself out of doors; which seems to refer to the acts of violence charged to have been committed in April 1814, during the confinement of Lady Westmeath, and afterwards acknowledged, in the conference with Mr. Wood, at the Waterford Hotel, as spoken to by that witness. It implores compassion and pardon for the brutality which he had shown to her in individual instances; and expresses "an earnest anxiety that arrangements might be made to secure her in case of any unfortunate recurrence." These are his own expressions. He adverts to the suspicion entertained of his continued intimacy with the mother of two natural children, which he had had before marriage, and admits that appearances might justify the supposition that it was the cause of such threats. He disavows the fact however, and it is strongly disclaimed by Counsel, and there is nothing before the Court that shows any such intimacy was continued. The tenor of these letters does, I think, very much confirm the account, given by Mr. Wood, of similar confessions at the meeting at the Waterford Hotel in Dublin, in September 1815. The result of this correspondence, however, leads to a reconciliation which was granted in Lady Westmeath's letter of the 18th October 1817, and was most gratefully acknowledged in Lord Westmeath's answer of the 26th.

He returns to England and cohabits with Lady Westmeath; and in November 1818, Lord Delvin was born. In the meantime it appears that Mr. Sheldon was employed in preparing the deed of reconciliation, as it is termed, to which I have before adverted. That instrument recites the marriage settlement by which Lady Westmeath was to have a jointure of 3000*l.* per annum, and that no provision had been made for the issue: It then recites, "that whereas disputes and differences had existed and arisen to such a height that they were on the point of separating and living apart, but by the intervention of friends she had consented to live and cohabit with him after he had executed these deeds, and thereby made provision for their issue." It then covenants, that "in consideration of such consent he settles his estates as is therein described, with a proviso that in case it shall happen, that by a renewal of such disputes and differences as had already caused their separation, she should find herself compelled to cease to cohabit, she shall receive yearly such sums as by their mutual friends shall be agreed to be a proper and sufficient maintenance, with a further proviso that the payment should be suspended during any subsequent reconciliation, and be resumed on any future separation to take place in consequence of ill usage, and gross

abuse." All that is specific is the arrangement for a separate maintenance. The sum of money, and the nature of the ill usage which is to give effect to it, are left to the arbitration of friends. Lord Westmeath covenants that in any separation he will execute the usual articles; and such an instrument was prepared in May 1818, which contains articles to that effect, and assigns to Lady Westmeath a specific sum of 1300*l.* per annum.

The depositions of Mr. Sheldon and Mr. Stephens relate principally to the execution of these deeds. Mr. Sheldon was the confidential agent of Lord Salisbury and of Lady Westmeath, and was adopted also as a common friend by Lord Westmeath, notwithstanding Mr. Sheldon's request that he would employ some other professional person. He speaks to the acknowledgment on the part of Lord Westmeath, in the summer of 1817, of his own ill-treatment of Lady Westmeath, as the cause of the separation which Lord Westmeath had prevailed on Lady Westmeath to abandon, by the most humiliating concessions and promises of amendment. The depositions of these gentlemen, however, relate principally to the execution of the deeds, and to the admissions of the Marquess as to past misconduct. They did not see Lord Westmeath use or threaten to use any personal violence to Lady Westmeath; and it is not an insignificant circumstance in this case, that Lord and Lady Salisbury have not appeared as the natural protectors of their daughter in these disputes; as it is said, "Lord Salisbury would have nothing to do with them." The present Marquess, then Lord Cranborne, was named trustee in the settlement, but without his consent; and he says he was not privy to the arrangements. He speaks, but very generally, as to his knowledge of the conduct of the parties. He says, "he was in the habit of going to their house in Bolton Street, and so far as he saw of the conduct of Lord Westmeath, during Lady Westmeath's pregnancy in 1818, he did not actually see anything amiss, but he does not mean to depose that there was nothing amiss in it."

The twenty-fifth and twenty-sixth articles relate to the manner in which they lived in separate apartments in Stratford Place. The twenty-ninth pleads, an attempt to compel her to give up the deeds, with a declaration that he would force her to give them up, and threats to challenge Mr. Wood, who was a trustee. The thirtieth pleads the last act of violence in his conduct towards Mrs. Wetherly the housekeeper, and towards Lady Westmeath, on the 20th of June 1819. These latter instances may be classed together, as they constitute the principal or only charge of personal violence in the latter part of the case, as they happened about the same time, and proceeded from the same cause, from an impatience of the state in which he had placed himself, and from a desire to reclaim and assert his marital authority. The account which is given of them by the witnesses, Johnson and Wetherly, is very similar, and there is no reason to question the truth of their evidence. Sarah Johnson says, "She lived as lady's maid with the Marchioness from April 1817 to 1821. She went with her to Hatfield in July 1817, where they staid seven months. She then removed to Stratford Place, and in January 1819 to a house in Bolton Street. During the first part of the time Lord Westmeath and the Marchioness slept in adjoining rooms, and communicating with each other; and they held intercourse, for Lady Westmeath became pregnant. It was on the 18th of May 1818 that they separated, and the door of communication was fastened.

She says, they were continually quarrelling, but of the particulars of any quarrel in Stratford Place she cannot depose, as they spoke principally in French. In Bolton Street Lord Westmeath had a sitting room and a bed room, adjoining to that of Lady Westmeath, but the door was secured. There were violent disagreements between them; how they began she cannot depose; he used to threaten that he would assume his rights again and be master, and bring down her little ladyship to her proper level, and show her to the world in her true character. On one occasion his Lordship found his way into her bed room, when she was dressing for an evening party; the deponent was with her; he began in French; he was quite frightful from rage, and stormed and raved like one that was mad; he proceeded afterwards in English. It was against Mr. Wood, her Ladyship's trustee, that he was most violent, applying to him all odious appellations; he said he would challenge him, and make him fight in France; Lady Westmeath was much terrified. He continued there as much as half an hour. This was in May 1819." But it is to be remembered that in April, 1819, Lady Westmeath had sent a message to him by the cook, "that she would not dine with him any more." Johnson speaks also in part to what happened in June 1819; but it will be more convenient to refer first to Mrs. Wetherly, the person principally concerned in that scene.

Mrs. Wetherly says, "she lived as housekeeper to Lady Westmeath in Bolton Street. One day in June, his Lordship desired her to come into the dining room, which was his sitting room; he asked her what wages were due to her, as he was about to discharge her, having given her warning about six weeks before (as is stated by another witness); he desired to see her books, keys, and accounts. She told him, she was her Ladyship's servant, and could not give them up; he was in a great passion, and flew out at the deponent; he called up the man servant, and sent him for a constable, and as he had used personal violence to her once before, she did not know but he might do it again; so she made her escape and went to Mr. Wood's house, where Lady Westmeath then was, and told her what had passed, and she did not return to Bolton Street for some days." Miss Weldon, who was the governess in Mr. Wood's family, fills up this account. "She accompanied Lady Westmeath to her own house; they went into the housekeeper's room; it was plain from the state of the presses and drawers that they had been forcibly opened; Lord Westmeath was in a most violent and extraordinary passion, amounting almost to fury; though apparently a good deal exhausted; he was as pale as a sheet of writing paper, his lips quivered, his whole frame shook with rage; Lady Westmeath asked him, 'what he had been about;' he replied, 'I have been breaking open your presses, and I will do it again; I will show you that I will be master in this house.' She said, 'she should apply to her trustees.' He said, 'he should like to see the trustees that would dare to interfere.' Lady Westmeath left the room, and returned again in about a quarter of an hour, when she and the deponent went away together to Lord Salisbury's house, and Lady Westmeath has not since resided in the same house with Lord Westmeath."

Sarah Johnson describes what passed when Lady Westmeath went up stairs; "Lady Westmeath called to her, and she attended her in her bed room: Lord Westmeath was then with her: Lady Westmeath said, 'I desire Lord Westmeath, you will leave my room:' he said 'he would

not; he would come into her room when he pleased; that he would have no more of their separate doings; that he would be master of his house, and would have no more interference of that family in his concerns.' He went down accordingly; Lady Westmeath took away some papers, and went to Arlington Street, and has not since cohabited with him." This account of Lord Westmeath's determination to enforce his marital authority, is confirmed by Mr. Stephens, who says, "that when he was in England in March and April, 1819, Lord Westmeath was living in Bolton Street, in separate apartments; that he complained of it to him as a grievance; and expressed his intention to enforce his marital rights, as he understood, by proceedings at law." These are the only specific charges of cruelty, spoken to by any witnesses after the reconciliation. On the other side, Lady Salisbury and Lady Glengall, Lord Francis Hill, and the Rev. Doctor Wellesley, who frequently visited the parties at their residences, in 1817, 1818, 1819, strongly negative the imputation of any acts of violence, according to their knowledge or belief.

On this review of the general conduct of Lord Westmeath, I am constrained to say, that there appears to me to be much in the evidence relating to his conduct in the years 1814 and 1815, which borders closely on legal cruelty, according to the strictest definitions which have been given of it. And I think the acts of personal violence then inflicted, might have sustained a suit for divorce on that ground, if they had then been made the subject of legal complaint. But it must always be remembered, that a natural test of injuries of this kind, is the sense in which they are received: if they are not resented as injuries at the time, a state of things intervenes, which either detracts from the weight of particular evidence, when brought forward at a subsequent period; or may introduce quite another view of the relative situation of the parties. Reconciliation will supersede the ground of complaint in these courts, as it annihilates even special articles of separation at Common Law. (a) It is true however that past injuries may be revived; and the real question appears to be, whether the acts, proved against Lord Westmeath in the latter parts of this history, will have that effect.

Mr. Wood says, "there was a reconciliation in 1816." The letters that passed in the autumn of 1817, establish the same fact: and the events which followed in 1817, 1818, 1819, do not furnish any instance of personal injury, or amount, in my opinion, to more than disagreements of mutual ill temper, and ill words. What will be the result of such a state of facts? The law was explained in the case of *D'Aguilar v. D'Aguilar*, by my learned predecessor, to this effect; "that though condonation might be taken away by subsequent facts, they must not be slender facts, but such as would be sufficient to found a sentence. (b) In a late case of *Durant v. Durant*, Vol. i. 763. [3 Eng. Eccl. Rep. 324.] the present very learned Dean of the Arches, adverting to that dictum in *D'Aguilar*, qualified those expressions, as too large, by referring to what occurred in the final judgment: but, from what fell from the Dean of the Arches on that occasion, I infer, that the facts, though slighter than might be required to found, or support a sentence of divorce, alone,

(a) See Roper on Husband and Wife, vol. 2. c. 22. 2d Edit.

(b) *D'Aguilar v. D'Aguilar*, 1 Consistory Rep. 134. notis. But, for the substance of the libel, and of Lord Stowell's observations upon its averments, together with his final judgment in that case, see Vol. i. 773. et seq. [3 Eng. Eccl. Rep. 329.]

must be such as partake of the nature of legal cruelty, being such in character and effect, as might justly revive the fear of injury attributed to the original acts.

The whole question would turn then, on the application of the principle so explained to the circumstances of this case; and I sincerely lament, that it has fallen on me to draw the very nice and delicate distinctions, on which such a question may depend. Then what has been the reconciliation? and what the revival in this case? Mr. Wood says, "the conference at the Waterford Hotel ended in a reconciliation:" and whatever might have been the effect of the violence committed at Granvilliers, cohabitation followed uninterrupted during the two following years. In the Christmas of 1816, there is this remarkable declaration of Lady Westmeath to her father, "that Lord Westmeath had been so uniformly kind to her, that she could not bear to see him unhappy." This was said indeed on the occasion of a request to obtain a loan of money for their common use; and the immediate object of the declaration may a little detract from its sincerity; but it shows the placable state of Lady Westmeath's feelings as to the past, and proves that present grievances were not intolerable. The renewal of complaints on her part, in 1817, as appearing in her letters, was founded principally on the subject of the natural children, and the demand of a settlement. The settlement is conceded in December, 1817, and the parties live together: Lady Westmeath becomes pregnant, and is delivered of a son in 1818: they visit together at Hatfield in January 1819: Lady Westmeath declares to Lady Salisbury, "that they are well together:" they live in the same house and at the same table till April, 1819, when Lady Westmeath sent a message by the cook, "that she would not dine with him any more."

In May, 1819, the scene occurs which is pleaded as an attempt to make her give up her deeds, and is described by Sarah Johnson. It is confined to a dispute of words, originating in a resolution on the part of Lord Westmeath, whether prudently or imprudently acted upon, I will not say, to reclaim his marital authority. The last disagreement was of the same kind. Lord Westmeath asserts his authority over Mrs. Wetherly, and discharges her. The breaking open of drawers and presses in the housekeeper's room was a violent and unseemly act, but it was directed principally against the housekeeper, who resisted and denied his authority; and the scene, which ensues with Lady Westmeath, was incidentally occasioned by her coming in, and exhibits little more than passionate words and ill manners.

The Counsel have represented these acts as a breach of the deed, and as cancelling the reconciliation, and reviving the former complaint, even if the particular acts done, should not be deemed sufficient to constitute an original case: but I do not feel myself warranted to adopt that construction. The test of legal cruelty, on which the judgment of the Court must be founded, is of a severer kind. If the husband could with safety be admitted to daily intercourse, in a state of subordination and subjection, there must have been an absence of any apprehension of danger to life, limb, or health, the ordinary criteria of legal cruelty in these Courts; and the breach of that subjection alone, without cause of reasonable apprehension of personal danger, though accompanied with rudeness and ill manners, will not in my judgment constitute a case of cruelty, or revive former injuries. Whether such conduct was a breach of the

articles of separation, I will not venture to determine. However improper it might be, it was not an injury of a personal nature: it was not only an injury infinitely slighter than the original acts of cruelty, but not of the same character, nor threatening the same consequences.

311. In the case of *Beevor v. Beevor*, Arches, 1803, *Sir William Wynne* said, "The Court would hesitate a long time before it would go a step further, than it had hitherto gone, to decree a separation on mere suggestion of violence of temper, and ill words." A reference was made on that occasion to the case of *Salisbury and Salisbury*, in the Arches in 1721, in which Dr. Bettesworth held, that a libel might be admitted without blows; but the cruelty there pleaded of constant threats and abuse, was not deemed sufficient to authorize a separation, or operate as a bar to a suit of restitution of conjugal rights, which was the nature of those proceedings. The principles, laid down by Lord Stowell, are to the same effect. In the case of *Evans and Evans*, that eminent Judge thus explains them; "that mere austerity of temper, petulance of manners, rudeness of language, want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty. They are high moral offences in the marriage state; but still they are not that cruelty, against which the law can relieve." And again, after stating what is not legal cruelty: "These are negative descriptions of cruelty: they show what is not cruelty, and are perhaps the safest definitions that can be given, in the variety of possible cases that may come before the Court. I take it that the rule usually referred to in our books of practice, is a good general outline of the canon law, the law of this country on this subject: the danger of life, limb, or health, is usually inserted as the ground, on which this Court has proceeded to separation. The Court has never been driven 312. off this ground." 1 Consistory Reports, p. 38, 39. (post.) And on an attentive comparison of all the cases that have been alluded to, I think I may affirm that the Ecclesiastical Courts have, hitherto, been uniformly strict in requiring proof of actual injury, or of real apprehension of injury, as it may affect the safety or health of the person, to justify divorce on the ground of cruelty.

Looking then to the obligations of marriage, and of nuptial cohabitation, so strongly upheld by the ecclesiastical law; looking to the great interests that are connected with it in the institutions of this country; and reflecting on the importance of adhering strictly to the principles, which have heretofore been held in these Courts on this subject, and which are incidentally made the test of civil rights, in the construction of the courts of common law and of equity, I do not feel that I can conscientiously pronounce a sentence of divorce in this case.

Foreseeing the possibility of such a result, I was desirous that the parties might reflect, on the situation in which they and the Court might be placed. I intimated a wish also that it might be considered in argument, whether any state of facts, short of legal cruelty, would warrant the Court to hold its hand, and dismiss a suit of this kind, without a positive decision on the point put in issue between the parties. The Counsel on both sides have concurred in thinking, that there is no middle course; and there would undoubtedly be great difficulties in the way of such a distinction, under the very strict rules which this Court has always applied to uphold the sacred obligations of marriage.

In the case of *Sir George and Lady Warren*, in 1771, and in the case

of *Evans v. Evans*, in 1790, which were cases of great animosity and strong recrimination," the Court adhered simply to the line of its duty, in pronouncing on the insufficiency of the charge of cruelty, leaving the law to take its course. In the former case, restitution was actually enforced by the authority of this Court. In the latter, divorce being refused, the disagreements probably subsided in terms of private separation, which had been before proposed. But the Court was no party to such a compromise: it did not disown the feeling of disinclination to incur the risk of provoking further disagreements between the parties; but it vindicated, in strong and forcible language, the necessity of upholding the general policy of the law, in opposition to such feelings, and in disregard of an over anxious solicitude for the effect on the particular case.

A dictum of Lord Stowell, however, has been cited, in which that eminent person is represented to have said, "that it had not been decided in these courts, that there must be legal *sævitia* to bar a suit of restitution, or that something short of legal cruelty might not have that effect." *Gregg v. Gregg*, Consistory, Trinity Term, 1821. That observation was thrown out, on the admission of the wife's defensive allegation, to a suit for restitution, and with reference, I think, more especially to a particular article, which pleaded threats and menaces to compel the wife to part with her property. In my note of that case the learned Judge observed, "I have not said there might not be cases so near to *sævitia*, as to warrant the Court to forbear, but I lay down no proposition on that point at present." The case did not come before Lord Stowell again, and nothing, as I understand, occurred to raise that point at the final hearing. The inferences to be drawn from the words of Lord Stowell, therefore, are rather adverse to such a distinction; if it is considered, that, in the long and accurate experience of that learned person, who presided in this Court for more than thirty years, his memory did not furnish him with any authority, for a more explicit declaration on this important point. Without saying that such a distinction may not be justified, under very strong circumstances, and in the wisdom of a superior Court, I feel myself compelled, in the conscientious discharge of my duty, to adhere to the principles on which this Court has hitherto acted; and to declare that in my judgment, the evidence in this case does not warrant me to assume such a discretion. (a)

Great, therefore, as the responsibility may be, as I am reminded, in pronouncing, that this Lady is bound to return to the society of her Lord, it is a responsibility which the law imposes upon me, and I must support it. The same law lays on her the obligation of complying with its injunctions; and I close this painful discussion with the consolation

(a) On this general question the "*Reformatio Legum*" remarks: "*Si rixæ, contentionēs, injuriæ, concertationes, acerbitates, contumeliæ, luxus, pravitates multiplicis generis tam vehementer exstuant, ut in eisdem ædibus conjuges commorari nolunt, nec cetera matrimonii jura sibi mutuò præstare, pœnis implicantur ecclesiasticis, et in eadem ædes compellantur, et etiam revocentur ad pia inter se communicanda matrimonii officia, modo nulli tales casus inciderint propter quos ipso jure divortium petere liceat.*" *De Matrimonio*, cap. 11. See also *De Adulteriis et Divortii*, cap. 11, 12. The French law appears to have allowed, on account of the husband's ill-treatment, "*la separation d'habitation*" upon slighter grounds than the Ecclesiastical Courts of this country. Pothier, "*Traité du Contrat de Mariage*," chap. 3. s. 1. 4th Edit. Vol. 3. p. 374. And the general principle of the ancient canon law seems to be expressed in these terms: "*Si tanta sit viri sævitia, ut mulieri trepidanti non possit sufficiens securitas provideri, non solum non debet ei restitui, sed ab eo potius amoveri.*" *Decret. Greg. lib. 2. tit. 13. c. 13. ad finem.*

of thinking, that she will have ample means of correcting my judgment by appeal, if it is wrong; or that it will rest with herself to reconcile it with her own happiness and comfort, if it is right.

The Court pronounced that Lady Westmeath had failed in proof of the allegations given and admitted on her behalf, and assigned her to return home to the Marquess of Westmeath, and restore to him conjugal rights, and decreed a monition against her so to do.

240-66. From this sentence an appeal was immediately interposed to the Arches Court of Canterbury. On the first session of Trinity Term 1826, the inhibition and citation were returned; on the first session of Michaelmas Term the process was brought in; and the cause was argued at the close of Michaelmas Term; and on the third session of Hilary Term, 1827, the Court proceeded to give sentence.

JUDGMENT.

SIR JOHN NICHOLL.

This appeal from the Consistory Court of London was, in the first instance, a suit for restitution of conjugal rights, brought by Lord Westmeath against Lady Westmeath, his wife. In answer to this demand, Lady Westmeath pleaded that Lord Westmeath had treated her with cruelty; and she afterwards, in a second allegation, charged Lord Westmeath with adultery committed subsequent to their separation. Lord Westmeath gave in a defensive plea denying both charges. On each side a great number of witnesses, on the whole exceeding fifty, were examined.

The Judge of the Consistory Court pronounced, that the wife had failed in proof of both her allegations, and decreed that she should return to matrimonial cohabitation. From that judgment Lady Westmeath has appealed, and I am now to determine whether the sentence ought to be affirmed, or reversed.

By the Counsel, on both sides, the case has been characterized as one of a very painful description. It has been very elaborately, and, I may truly add, very ably argued here; and it has been stated that it underwent a most ample discussion in the Court below; and that the Learned Judge, in delivering his sentence, adverted to all the circumstances alleged in plea, and to the several parts of the evidence on both sides, expressing very fully the precise grounds of his decision. Those grounds were:—

First: That the adultery was not proved.

Second: That the cruelty, in the first instance, was proved, but that its effect was removed by subsequent cohabitation.

Third: That after this condonation, as it is technically called, there were no acts of cruelty proved, sufficient either of themselves, or as a revival of former cruelties, to entitle the wife to a sentence of separation.

And finally: That as she was not entitled to such a sentence, the law knew no other course than to compel a return to cohabitation.

These also are the positions upon which the Counsel have mainly relied here.

As the case, then, is of this distressing character; as every part of it has been so thoroughly investigated, and as the grounds of decision in the Consistorial Court were so distinctly laid down, I could have wished to consider myself relieved from the necessity of going, in detail at least,

over those points respecting which I clearly concurred with the Judge of the Consistory, reserving myself to state, more at length, those other points, if any, upon which I might have entertained some doubts, if not even a difference of opinion; but as it has been urged in argument, that Lord Westmeath has not been proved guilty of any cruelty, and that he is anxious to have his character cleared from that imputation, it becomes my duty to enter more at large into that branch of the case than inclination would otherwise have led me.

The parties were married in May 1812, and finally separated in June 1819; and this period, therefore, embracing seven years of cohabitation, must be examined. The cause has been depending above five years, and is loaded with an immense mass of evidence. For the purpose of tracing the way more readily through this maze of facts, an outline of some prominent features may be stated with convenience, adopting the division of the history made by counsel.

First: From the marriage in May 1812, to the latter end of 1815.

Second: Thence to the latter end of 1817.

Third: Thence to June 1819, when Lady Westmeath finally left her husband.

During the greater part of the first period, namely, from May 1813, to September 1815, the parties dwelt at Clonyn, in Ireland, the Westmeath family seat; but the late Lord Westmeath, the father of the party in this suit, was then residing at Dublin, where he died towards the close of the year 1814. About the end of May 1814, Lady Westmeath, then Lady Delvin, gave birth to a daughter, Lady Rosa Nugent, who is still living. Unhappy differences arose between these parties during their abode in Ireland, and had nearly produced a separation; but, in September 1815, upon a discussion of the subject, and by the interposition of a friend, they were reconciled, and came over to England, intending afterwards to proceed to France. At the end of 1815, when the second period commences, this intention was carried into execution. They continued abroad till the autumn of 1816, then returned to England, paid a short visit to Ireland, and again came back to England.

In the course of the years 1816 and 1817, their unhappy disputes were renewed, and reached such a height that Lady Westmeath insisted on a separation; but a reconciliation again took place, upon the execution, by Lord Westmeath, of a prospective instrument, which was signed in December 1817. The parties then resumed their cohabitation, and lived part of the time in Saville Row, and part in Stratford Place; and Lady Westmeath again became pregnant, and gave birth to a son in November 1818; but long before that event the differences between the parties had recommenced, and formal articles of separation were entered into, bearing date the 30th of May 1818. Subsequent to these articles, by which 1300*l.* a year was settled as a separate maintenance for Lady Westmeath, no matrimonial cohabitation took place between the parties; but at the earnest desire of Lord Westmeath, and by the recommendation of friends, in order that the separation might not be known to the world, Lady Westmeath was prevailed upon, reluctantly, to consent to Lord Westmeath having a bed in the house where she resided. About Christmas 1818-19, Lady Westmeath removed to Bolton Street, Lord Westmeath still being allowed the use of a bed-room: for a time they generally dined together, but in April that intercourse was broken off, and, at length, in June 1819, in consequence of certain transactions which

then occurred, Lady Westmeath withdrew altogether from her husband's society.

Neither party, however, had recourse at that time to the Ecclesiastical Court. Lady Westmeath, relying on the validity of the deed of separation, and on the separate maintenance provided by that deed, did not bring any suit for divorce by reason of cruelty against her husband; nor did Lord Westmeath apply to the Spiritual Court to interpose its authority to compel the return of his wife to cohabitation; but he applied to the Court of Chancery, to enforce the delivery up of the articles of separation, (*Westmeath v. Westmeath*, Jacob's Cha. Rep. 140,) and it was not till after proceedings of nearly two years' duration in Chancery, and just before the matter was finally decided, and when it was pretty well ascertained that he could not succeed there, that he instituted a suit in the Consistory Court against his wife for restitution of conjugal rights. The wife, then, as matter of defence, charged the husband with cruelty, and on that ground prayed a sentence of separation; a prayer which, according to the established rules of these Courts, she had a right to engraft on the proceedings commenced by the husband. But in consequence of this delay in resorting to the proper tribunal, the Court is placed under the disadvantage of having to decide upon facts spoken to by witnesses, whose memory and recollections may have become in some degree faint and confused by the interval, that has been suffered to elapse between the transactions and the time of making their depositions.

After this general view of the history of the parties and of the suit, the Court has to consider the case, and to pronounce, whether the husband is entitled to its aid in order to compel his wife's return to him; or, on the other hand, whether the wife, in her defence, has established a right to a sentence of separation, or is on any ground to be released from the effect of the proceedings instituted on the part of her husband.

Before entering upon the particular points of the case, it may be proper to notice one or two occurrences tending to create a strong prepossession in regard to the merits. One is, that a part of Lady Westmeath's family is unfavourable to her defence; so far, that her mother, who would most naturally be expected to be strongly prejudiced in her behalf, has been called as a witness in support of the husband's plea. A feeling against Lady Westmeath's cause might well be excited by this circumstance, but too much weight must not be given to it; for if it should appear, that Lady Westmeath was anxious, perhaps generously and wisely, to conceal from the knowledge of her family any ill-usage she might experience; that the commencement of her unhappiness, which had nearly produced a separation, took place during a considerable residence in Ireland; that yet the causes of complaint, after discussion, were for a time extinguished by a reconciliation before their return to England in September 1815; that the mother was so averse to publicity, and to the affair becoming "town-talk," as to urge her daughter to a renewal of cohabitation, even after Lord Westmeath had consented to sign articles of separation; that this feeling became almost a morbid sensibility upon the subject; and that at length she became for some cause highly offended at her daughter;—the fact so much calculated at first sight to produce an unfavourable impression against the wife, would, on a view of all the circumstances in evidence, lose much of its effect on my mind. I see no impropriety, nor any injudiciousness, nor want of proper feeling on the part of Lady Westmeath, in resorting for assistance to Mr.

Sheldon, the old friend and legal adviser of her family, rather than to the family themselves; or in declining to annoy her father with her grievances, who seems to have been extremely averse to interfere in any such domestic matters; or in abstaining from application to her mother, who was indisposed to listen to any remedy that might give publicity to the affair, or to her brother, who might have involved himself in a personal quarrel. None of these persons could give her legal counsel; it was that of which she stood so much in need; and properly enough she applied to the legal as well as the friendly advice of old Mr. Sheldon—the very person to whom her own family would probably have recommended her, if they had been consulted.

The other occurrence, tending to spread a heavier cloud of prejudice over her defence, is the production of a set of witnesses, from Ireland, in support of the charge of adultery; which witnesses have since been indicted for, and convicted of, a conspiracy against Lord Westmeath; and their depositions in this cause tend strongly to support the propriety of that conviction:—yet, looking at all the circumstances connected with that part of the case, I see no sufficient ground to believe that Lady Westmeath herself was privy to that conspiracy, or to the falsehood of the charges to which the witnesses were brought to depose. She might be too credulous; but situated as she was, and looking back to some past events, it was natural she should lend an unsuspecting ear to such tales. Even her agents and advisers would readily give credit to them; but the conviction of these witnesses was calculated to occasion a prejudice greatly to the disadvantage of the defence set up by Lady Westmeath; and the Court itself, warned by the discovery of this perjury, must look with greater caution and reserve at other parts of the evidence. 450.

The witnesses referred to were produced in support of some of the charges of adultery; and as I concur with the Judge of the Consistory Court, that no part of the adultery has been proved, it may be convenient at once to dispose of that branch of the case.

The accusation of adultery with three of the persons has been distinctly and properly abandoned. As far as it relates to another person, of the name of Brennan, there is no proof by any credible witnesses of any fact from which adultery can be inferred. And although, in respect to the remaining person, Smyth, the evidence of Mrs. Winsor, could it be fully relied upon in all its parts, coupled with the subsequent calls of Smyth at three several places where Lord Westmeath lodged, would furnish grounds of pretty strong suspicion; yet considering that no indecent familiarity was ever seen, and that the circumstances deposed to are not in themselves so unequivocal as to exclude explanation consistent even with entire innocence, connecting them also with what has occurred respecting the other witnesses to adultery, I concur with the sentence already given—that the wife has not proved her second allegation so as to entitle her to a sentence of separation by reason of the adultery of her husband. 167. 845.

In proceeding, then, to the consideration of the charge of cruelty, the original defence set up, and the material branch of this cause, it is necessary to examine;—

First,—The law that applies to such a charge.

Second,—The character of the misconduct charged.

Third,—The proofs in support of such charge.

In respect to the law, the question naturally occurs, what constitutes

cruelty in the view of the law? It is difficult, and hardly safe, and at the same time it is unnecessary, to define it affirmatively with precision. It can only be described generally, and rather by effects produced than by acts done; even the quotation from Clarke is very loose, and adopts this mode of describing by effects. "Si maritus uxorem inhumaniter verbis et verberibus tractaverit, et aliquando venenum loco potus paraverit, vel aliquod simile commiserit, propter quod mulier, sine periculo vitæ, cum marito cohabitare aut obsequia conjugalium impendere non audeat," Clarke's Praxis, tit. 107. Oughton, tit. 193. s. 18. What amounts to "inhumaniter?" What is "aliquod simile?" What is the conduct, "propter quod obsequia conjugalium impendere non audeat?" or (as the effect of this passage is stated in another authority) "per quod consortium amittitur?" These definitions leave the matter very undefined and loose. Clarke himself, though a highly respectable authority, yet only professes to write upon practice; and, in many respects, the practice of his day is become obsolete. The law may more satisfactorily be sought in adjudged cases, especially in the principles laid down by that highly gifted individual, the noble Lord who long presided in the Court where the matrimonial law of this country is most frequently discussed. A very valuable collection of his decisions has been made. They have been accurately reported, and are entitled to be received as of the highest authority, not as making the law (for no Judge ever more carefully abstained from assuming such a power), but as declaring what the law is; and I must add that my own knowledge and experience, as far as they go, lead me fully to concur in the principles propounded in those passages which I am now about to quote. In the case of Evans v. Evans, Lord Stowell said, "what is cruelty? In the present case it is hardly necessary to define it, because the facts here complained of are such as to fall within the most restricted definition of cruelty. I shall, therefore, decline laying down a direct definition. The causes must be grave and weighty, and such as show an absolute impossibility that the duties of the married life can be discharged. In a state of personal danger no duties can be discharged, for the duties of self-preservation must take place before the duties of marriage," Evans v. Evans, 1 Consist. Rep. p. 37. Further on, he says, "proof must be given of a reasonable apprehension of bodily hurt. I say an apprehension, because, assuredly, the Court is not to wait till the hurt is actually done; but the apprehension must be reasonable, not arising merely from diseased sensibility of mind," Ibid. p. 40. So in Harris v. Harris: "There must be something that renders cohabitation unsafe, or is likely to be attended with injury to the person, or to the health of the party. Words of menace may warrant the Court to interpose, and prevent the actual mischief; but when such violence of language is accompanied with blows, it is a more aggravated case," Harris v. Harris, 2 Consist. Rep. 140. S. C. 2 Phill. 111. Again, in Waring v. Waring: "The usual principles require, that such complaints should be supported by proofs of violence and ill-treatment, endangering, or at least threatening, the life, or person, or health of the complainant, 2 Consist. Rep. 154. S. C. 2 Phill. 132. The same doctrine is held in the case of Holden v. Holden: "The Court has to decide whether the conduct of the husband amounts to that *sævitia* which authorises a separation. On this point the Court has had frequent occasion to observe, that every thing is, in legal construction, *sævitia*, which tends to bodily harm, and in that manner renders coha-

bitation unsafe. Whenever there is a tendency only to bodily mischief, it is a peril from which the wife must be protected. It is not necessary to inquire from what motive such treatment proceeds; it may be from turbulent passion, or sometimes from causes which are not inconsistent with affection. If bitter waters are flowing it is not necessary to inquire from what source they spring. If the passions of the husband are so much out of his own controul, as that it is inconsistent with the personal safety of the wife to continue in his society, it is immaterial from what provocation such violence originated.

"Secondly: The law does not require that there should be many acts; for if one act should be of that description which should induce the Court to think that it is likely to occur again, and to occur with real suffering, there is no rule that should restrain it from considering that to be fully sufficient to authorise its interference.

"Thirdly: It is not necessary that the conduct of the wife should be entirely without blame; for the reason which would justify the imputation of blame to the wife will not justify the ferocity of the husband, *Holden v. Holden*, 1 Consist. Rep. 458. [*post.*] These, then, are the principles by which these Courts have been governed; and according to which it is my duty to decide. There must be ill-treatment and personal injury, or the reasonable apprehension of personal injury. What must be the extent of injury, or what will reasonably excite the apprehension, will depend upon the circumstances of each case. So likewise that may aggravate the character of ill-treatment must be deduced from various considerations—in some degree from the station of the parties—in some degree from the condition of the person suffering at the time of the infliction. The complexion of individual acts may be heightened; nay, the acts may almost change their very essence by the accompanying circumstances. Not only particular stations and situations, and the feelings almost necessarily arising out of them, but even acquired feelings may be entitled to some attention. In *Evans v. Evans*, Lord Stowell's remarks establish, 1 Consist. Rep. 38. [*post.*], that what wounds not the natural but the acquired feelings will not absolutely be excluded by the Court, where they are stated merely as a matter of aggravation. *A fortiori* then, feelings which naturally belong to a wife or to a mother of every station, constitute a part of the consideration.

What, then, is the character of the facts charged; between what parties, and in what situations? It may be sufficient to state that personal violence is charged; "blows—blows repeated and severe, and aggravated by the high rank and station of the parties. The acts imputed, if proved by credible evidence, come directly within the strictest definition of cruelty—of aggravated cruelty. A blow between parties in the lower conditions and in the highest stations of life bears a very different aspect. Among the lower classes, blows sometimes pass between married couples who in the main are very happy, and have no desire to part; amidst very coarse habits such incidents occur almost as freely as rude or reproachful words: a word and a blow go together. Still, even among the very lowest classes, there is generally a feeling of something unmanly in striking a woman; but if a gentleman, a person of education, the discipline of which *emollit mores* and tends to extinguish ferocity; if a nobleman of high rank and ancient family uses personal violence to his wife, his equal in rank, the choice of his affection, the friend of his bosom, the mother of his offspring—such conduct in such

a person carries with it something so degrading to the husband, and so insulting and mortifying to the wife, as to render the injury itself far more severe and insupportable. The particular situation of the parties, when the ill treatment is inflicted, may create a still further aggravation; but it is unnecessary to anticipate the descriptions of such situations.

x The peculiar nature and main features of the cruelty imputed may, however, be here conveniently noticed: it is not that of cold malignity, or savage, continual, unfeeling brutality of disposition; it is not that of satiated possession producing disgust and hatred: the acts charged are not inconsistent with occasional kindness, with the existence and continuance of strong attachment; nay, even with violent affection; but the main features of the alleged cruelty are great irritability of temper, producing ungovernable passion, ending occasionally in acts of personal violence, and, of course, attended with the danger of a repetition of personal mischief. Such is the nature of the misconduct of which the husband is accused; and it is not extraordinary that Lord Westmeath should be anxious, if he can, to clear his character from such a stigma.

46. The principal witnesses to the direct ill-treatment and violent behaviour are domestic servants. Such must of necessity, for the most part, be the sort of evidence in causes of this description; for ill-usage of the species imputed is of a domestic nature. It generally takes place in secret, sometimes in the retirement of the night. Servants, more especially those about the wife's person, are alone likely to witness those acts. Even by them the acts themselves are not very frequently seen, and can only be inferred from the accompanying circumstances or the resulting consequence, or be proved by the husband's acknowledgments. From experience, the Court is well aware of the degree of caution with which it is necessary to listen to evidence of servants on such matters. Allowance must be made for some degree of bias, more especially when they are deposing to general treatment after a long lapse of time. In that case, circumstances happening only occasionally are recollected prominently, and are heaped together in the mind so as to appear continuous in the memory even of a witness meaning to depose correctly. But notwithstanding these objections, the testimony of such witnesses is not at once to be repudiated; for it may be the only means of arriving at truth and justice. If they give their evidence with reasonable fairness, without too much forwardness, and still more if they are confirmed upon facts capable of corroboration, they become entitled to credit, even upon circumstances incapable of extrinsic confirmation. The Court, then, must weigh the depositions in this cause under these considerations, and must examine how far they are mutually supported, and particularly how they are corroborated by the admissions of the husband himself, and by all the *res gestæ*.

It thus becomes necessary to travel through the facts in their detail, pursuing the order in which they occurred, and the outline already given.

Soon after their marriage the parties visited Ireland, came back to England the latter end of the same year, and about May 1813, went to reside at Clonyn. During the remainder of the year there were occasional quarrels, but no acts of personal violence, so far as appears from the evidence. Mackenzie, who was Lady Westmeath's own maid, is

the principal witness to the early part of the history: she had lived in the father's (Lord Salisbury's) family from her Ladyship's childhood, and accompanied her when she married: she was, of course, much attached to her mistress, and has a strong bias in her favour; but she gives her evidence with considerable fairness, and is corroborated and confirmed in most of what she states. She gives the following account of the earlier part of the cohabitation:—"About twenty-six years ago she went to live in Lord Salisbury's family, and lived there till Lady Westmeath married, in 1812, when she went to live with her as her maid. In 1814 deponent married; then became the housekeeper at Clonyn; and so continued till 1819, when she and her husband, who was also in Lord Westmeath's service, were dismissed by his Lordship. In 1812, and beginning of 1813, the parties resided partly at Black Rock, near Dublin; partly at Hatfield. In May, 1813, they went to reside at Clonyn, and continued there till September, 1815, when they came to England, in their way to Paris, leaving deponent at Clonyn with the child under her care. At Black Rock and Hatfield she observed Lady Westmeath at times apparently unhappy, but she witnessed no quarrel, and heard no improper language by Lord Westmeath. Observing that Lady Westmeath continued unhappy, deponent took an opportunity of speaking of it to her Ladyship, who referred it to the behaviour of Lord Westmeath to her, but begged the deponent would not mention it. They had not been long at Clonyn, when money for housekeeping was not to be had; Lady Westmeath was literally without money for months together. She cannot depose that Lord Westmeath positively refused to let her have it, but Lady Westmeath was continually fretting about it. Deponent has heard her beg him to let her have some; and say that if he would but let her have her pin-money she should not be so distressed as she then was. When tea and sugar, and such articles, were wanted from Dublin, there was no money to send for them, and Lady Westmeath has gone without them: she lived for economy whenever Lord Westmeath was from home as poor as any poor person could; and when she asked his Lordship for money he abused her; deponent has heard him. On such, and other occasions, deponent has heard him call her a damned bitch, and say he would kick her to hell." These surely are words of menace. "He put himself into most violent passions; he was more like a madman than a reasonable being." Here is turbulent passion, not under his own control! "Deponent never knew of any provocation Lady Westmeath gave him: she wished for a quiet life; and deponent has known her to leave the room, to avoid any thing unpleasant, when he was inclined to quarrel. Lady Westmeath is a quick-tempered woman, and when irritated would show it: but she was never inclined to quarrel, and never began, by giving any provocation, to deponent's knowledge."

She then mentions "her misery for want of fuel, and from the wretchedness of the place; that she bore it with great fortitude;" adding, "that if Lord Westmeath had been kind to her, and whenever he was good tempered, she did not care what she put up with."

Here then if the witness be credited, is harsh treatment, unnecessary privations, words not only of reproach, but of menace: while, on the part of the wife, there is forbearance—no provocation. She is not the *prior lædens*, but shows every disposition to endure her privations with patience, "if his Lordship would but be kind." The want of money

will however be found, in Lady Westmeath's apprehension and belief, to have been connected with another very galling circumstance, which will presently be noticed.

That there were quarrels at this time, and that Lord Westmeath admitted himself to be the aggressor, and the person to blame in these quarrels, is confirmed by Mr. Wood, the near neighbour of the family (Rossmead, his residence, being about a mile and a half from Clonyn), who is appealed to and called in as the friend and intercessor of Lord Westmeath. He is considered as his friend throughout the transaction, and during all the cohabitation of these parties, or, at least, he ceased only to be so just at its very conclusion. He commences, at all events, as the friend of Lord Westmeath. If he became at length the friend and protector of Lady Westmeath, what is the inference? Why, the conduct of Wood bears testimony that Lord Westmeath was the offending party. It is true, however, that at the time of giving his evidence Lord Westmeath was imprisoned at his suit. That he was obliged to prosecute Lord Westmeath for conduct, the particulars of which do not appear, is no reason why his testimony should be discredited: a prosecutor's own evidence is received in direct proof of the injury for which he prosecutes. Mr. Wood is under some degree of bias, and is to be listened to with care, particularly in matters of mere opinion; but he is credible in regard to the facts to which he deposes, and, besides, he is fully corroborated.

There being then no sufficient ground for objection to this gentleman's testimony, I find him stating, "that he was from time to time called on by Lord Westmeath to interfere on his behalf, and to intercede for him, and to prevail on her Ladyship to overlook his aggressions, Lord Westmeath uniformly acknowledging that he had misconducted himself." I shall have occasion, presently, to refer to Mr. Wood's evidence more in detail, and to see how he is confirmed.

Lord Westmeath being sometimes in Dublin, during the year 1813, his wife wrote to him constantly. Fourteen of her letters of that year are exhibited; they are written in the terms and tone of an affectionate wife, and they are relied upon as a disproof of the facts deposed to. To me they appear in no degree inconsistent with occasional quarrels, and fairly to bear a construction very different from that which has been attempted to be put on them, and not discreditable to Lady Westmeath. In that view, they would tend to show her good sense and good disposition in making no allusion to those occasional acts of harshness; and to evince that by conciliating conduct she hoped to soften the violence of her husband's temper. This rather seems the true view of them when connected with other parts of the case.

The transactions of the early part of the following year, 1814, become more material. Besides the endurance of many privations during the severe winter of 1813-14, when in a state of advanced pregnancy, an act of personal violence occurs which is thus deposed to by Mackenzie on the seventh article:—About a month before Lady Westmeath's confinement, Lord Westmeath called deponent up, about four o'clock one morning, to go to Lady Westmeath; when deponent went, Lady Westmeath was lying in bed, and Lord Westmeath standing by in his dressing gown: deponent asked Lady Westmeath if she was taken ill: she said, No; but that Lord Delvin had been beating her, and had kicked her in the side; and she complained of being

in pain from it. Lord Westmeath then said, Emily, you provoked me to do it. Lady Westmeath looked at him, but said nothing to him; but asked deponent why she had come? Deponent said, Lord Delvin had called her. Lady Westmeath said, she might go to her own room again. Lord Westmeath appeared by his manner, when he called her, to be frightened." An admission of the truth of the charge is here then necessarily implied from his observation, "You provoked me to do it." It is true that, when he has done it, he himself is frightened, and calls the maid; but he in effect admits that her statement is correct. How ungovernable must be the passions of a husband who, scarcely a month before his wife's confinement of her first child, can be hurried away to such an outrage: it requires no definition of cruelty to pronounce this to be an act of aggravated cruelty. "You provoked me to do it:" no provocation could justify or palliate it. It will hereafter be seen what calls forth similar inflictions of personal violence, when witnesses are actually present at the commencement of the quarrel. It may also be proper at this stage to enquire, what is suggested, on the part of the husband, as the sort of provocation given by the wife to excite him to ill treat her.

It appears that, before the marriage, Lord Westmeath had two natural children. This was not, at that period, communicated to his intended wife, as in candour as well as in prudence it ought to have been. He did worse than entirely conceal it; for that might have been imputed to a feeling of delicacy: he communicated one half of it; he desired her brother, then Lord Cranborne, to mention it to her, that he had a natural child; not informing even him that he had two. The wife, however, afterwards discovered the fact. This showed contrivance and deception, as well as concealment; and he asserts, that she was constantly reproaching him because he had two natural children, instead of one only. This assertion, again, is only half the truth; or, rather, it is much less than half the truth. She complained, that he had one of those children whilst paying his addresses to her; she complained, that he had kept up a clandestine communication with this woman (a married woman) and her children, even after his marriage; she complained, that a considerable part of his income, instead of being employed on its legitimate objects, namely, to provide for the comfort of his pregnant wife during the severe winter, was diverted in an unreasonable degree, to the support of this woman and her children. What could be more galling and even heart-breaking to an attached wife, than the belief, or even suspicion, that such was the case?

Mackenzie, to the eleventh interrogatory, answers; "Lady Westmeath did sometimes talk to the respondent about these two illegitimate children, unburdening her mind; for she was very unhappy about them and their mother." Lord Salisbury, to the tenth interrogatory, says; "Lady Westmeath has used very strong language in speaking of Lord Westmeath, in consequence of the deception practised upon her by him, in having concealed a part of the truth from her; and her belief that further deception, respecting the mother of these children and his lordship's connection with her, was still practised." To remonstrate on this supposed violation of her husband's duties was natural, and was justifiable. The evidence sufficiently proves, indeed Lord Westmeath's own letters show, that she had some foundation at least to make remonstrances, without any very great proneness to jealousy.

The temper of this lady is suggested to be extremely violent; and it

should seem that, when irritated, she could express herself with warmth, and even bitterness and acrimony, for she was not insensible to injuries and to insults; but she had considerable self-command, and her natural temper and disposition are described as being good: so say those who know her best, and upon interrogatories put to them by Lord Westmeath.

Lord Salisbury, to the seventh interrogatory, replies, "Lady Westmeath is of an amiable and easy temper; under circumstances of serious provocation she manifests great warmth, even to violence of temper; but not otherwise." So Mr. Sheldon, to the fifth interrogatory; "Lady Westmeath is not, to the respondent's knowledge or belief, a woman of a most violent and ungovernable temper; she is warm-tempered, but not an ill-tempered warmth; she is a woman of a very ardent and anxious, but affectionate disposition, capable of being irritated by ill-usage; she is naturally of a most amiable disposition; she has, in the deponent's presence, reproached Lord Westmeath with considerable acrimony, but it was done with more of dignity than violence; though the respondent has seen her evince considerable irritation towards her husband, not unprovoked, as he believes."

The Rev. William Stephens, Lord Westmeath's agent, gives nearly the same description of her temper, in answer to the seventh interrogatory: "He has seen violence of temper displayed by Lady Westmeath on the occasion of her complaints against Lord Westmeath, under her sense of his ill-treatment; he has heard her express herself in strong terms of contempt of what had been, to respondent's knowledge, Lord Westmeath's conduct, and which could not but excite the feeling in her mind."

It may be gathered from the general result of the evidence, and of the facts, that these several accounts are not an unfair representation of Lady Westmeath's character and tone of mind. I shall not state the opinion of the servants, but their conduct speaks to the same effect. They live long with her, and are attached to her. Her own maids, three in succession, live with her till they marry, nearly three years each. I see nothing of a fretful, peevish, and worrying temper in her letters, still less of a perverse and malicious disposition, that took delight in irritating and provoking a husband without cause. Behaviour which wounded her mind in its tenderest and best feelings—in her affections as a wife—in her fondness as a mother—afflicted her acutely; and she had spirit to remonstrate upon mal-treatment, and, when it was aggravated by repetition, she had firmness and resolution to insist upon redress and protection: but in all these letters, in 1813, and the beginning of 1814, (and the fact is particularly deserving of my attention,) there is no reference to complaints or quarrels, no spiteful allusion to the subjects even that hurt her most—to this woman and her children.

I will proceed, then, to the charge in the eighth article, of ill-treatment during her confinement, in May 1814. This is not deposed to by Mackenzie; it probably passed only between the parties themselves; and in contradiction to it, or at least its probability, are produced Dr. Barlow, the accoucheur, the nurse, and one of the servants (the cook) at Clonyn. They can only speak negatively, "that nothing of the sort passed to their knowledge;" but they also say affirmatively, "that Lord Westmeath was a most attentive, tender husband, and that they seemed the happiest couple that could be imagined." At such a time, if ever,

at the birth of a first child, there would be a mutual kindness, and the fondest affection. But what in reality did take place during even this very period?—The very conduct imputed. Direct evidence could not be expected, but it is proved by the subsequent admission of Lord Westmeath, confirmed by his own letters. In 1815, Lady Westmeath distinctly accused her husband of these facts, and he as distinctly admitted them.

Mr. Wood, to the twelfth article, deposes: "He remembers, in particular, she gave an account, that about a fortnight after she was brought to bed, he had threatened to disinherit her child, and to settle his fortune upon his brother by the half-blood; his discontent and anger at her not suckling her child, and his unkindness, violence, and cruelty to her."—"During this time Lord Westmeath was walking up and down the room, apparently a good deal annoyed by the recital, striking his head occasionally, but he acknowledged distinctly the truth of all she said."

But that Lord Westmeath made such an admission does not depend upon either the credit or the recollection of Mr. Wood; it results from his own letters. In letter No. 30, Lady Westmeath thus writes to Lord Westmeath, in September 1817: "When my child was twelve hours in the world, you told me, 'you would be damned if you gave twenty-five guineas a year to a bitch of a nurse. Why the devil could I not nurse her myself?' though the doctor told you I was unable. Three weeks after, the child was to be disinherited, and settle every thing upon Thomas; you took possession of my pin-money; would turn me out of doors if I dared to insist upon having it."

Lord Westmeath's letter, No. 5, is in answer:—"Then was the folly of my saying I would disinherit Rosa. You can call it by any other name, though I was a brute to say it. Then there was my saying, in passion, I would turn you out of doors. If I was to qualify the brutality of such expressions, I should not be sensible of the light in which I cannot deny they deserve to be seen."

To what does this answer amount? He admits the fact; he does not deny the time at which it took place; he himself denominates it an act of brutality. The ignorance of this event by Dr. Barlow, by the nurse, and still more by Mackenzie, only shows Lady Westmeath's forbearance, and her wish to bear her wrongs secretly and in silence. But here again, how ungovernable must have been the temper of that husband, who at such a time, would resort to such heart-breaking menaces.

During the subsequent part of the year 1814, acts of violence, deposed to by Mackenzie, are necessary to be stated. She thus deposes, on the ninth and tenth articles. After relating that the parties went to Dublin after the confinement; that they staid at Leinster House, his Grace being absent; that they went out one day to dine at the house of the late Lord Westmeath in the same street; that she was present when Lord Westmeath returned, and ordered his wife's clothes to be packed up, saying, that horses would be at the door early the next morning to quit Dublin; and when they came home in the evening she saw that there had been something amiss; she proceeds:—"At an early hour in the morning Lord Westmeath came to her and called her up," in the meantime Lady Westmeath had fastened her own door, "Lord Westmeath stood at it for as much as an hour and a half: he called to Lady Westmeath to let him in, and promised he would not beat her any more.

At last she did open the door, and he went into his own room. In a little time deponent heard Lady Westmeath scream out 'Murder,' upon which deponent went into their room; they were both out of bed, and just as deponent went in he was about to strike her Ladyship. Deponent stepped in, and saved her for that time. Deponent said, 'words were bad enough without blows;' but he was swearing at and abusing Lady Westmeath, and talking so fast deponent could not well know what he said. Lady Westmeath then said 'he had been beating her again;' he did not deny it: she mentioned where he had struck her: deponent succeeded at length in quieting him; prevailed on them to go to bed, and left them."

To the tenth article she deposes:—"On the following morning Lord Westmeath went to get some lotion, and for several days it was applied, two or three times a day, by deponent, to a severe bruise, where Lady Westmeath said before, that he had struck her on the breast. It was a very serious bruise, at first black, after a time all kind of colours. She remembers making a thick handkerchief to hide it, when they were going to the Duke of Leinster's country house. Lady Westmeath was for some time in great alarm, fearing it would end in a cancer; and the blow was enough to excite such an apprehension." These facts require no comment, and can receive no exaggeration nor aggravation. Here is beating, and beating a second time, in breach of a recent promise; and here is personal "violence," of that sort, as not merely to hurt and injure the person, but to endanger health, and even life. Lord Westmeath's answers to some of these articles are not immaterial. The Court would willingly suppose that, in respect to some of his answers, his mind was so obscured by fury and rage, that he did not accurately remember all the circumstances; he admits, in the seventh article, "that on one occasion he had slightly slapped his wife's face:" that article is confined to a transaction before her confinement, and he may understand the answer to be limited to facts prior to that period; but how does he answer to the substantive acts of violence, particularly to those laid in the ninth and tenth articles, when Lady Westmeath screamed out "Murder," and brought back Mackenzie a second time to her assistance, and when the severe blow on the breast had been given? The ninth article pleads the first beating; and then goes on, "that shortly after Lord Delvin again quarrelled with his wife, used most violent language to her, and attempted to smother her with the pillows; that she screamed out for help, and her cries brought Sarah Mackenzie to her assistance." Mackenzie, as already shown, speaks to hearing the cry of "Murder," to going to Lady Westmeath's assistance, and to the other circumstances, stated above from her deposition, but she can say nothing respecting the use of the pillows. How, then, does Lord Westmeath palliate this in his own answers? "That Lady Westmeath having used insulting conduct and behaviour towards him immediately on retiring to bed, he admits that, in his anger, on the impulse of his wounded feelings, and not with an intention of injuring her, he did for a moment, but without violence, place a pillow over the face of his said wife, but instantly took it away."

To the tenth article he says, "that Lady Westmeath having complained that he had hurt her neck, he did apply to Mr. Crampton, a surgeon; and admits, that in order to conceal from Mr. Crampton the manner in which she had received the imagined injury, he did, at the

suggestion of his wife, tell Mr. Crampton she had fallen against an imperial, or table. He admits that Mr. Crampton prescribed a lotion to be used."

Here then is a confession of personal violence in return for words; of personal violence of an extraordinary sort; "in his anger," putting a pillow over her face—the effects are such as to require medical aid—the blow is so severe as to bear the appearance of a fall against an imperial. If the false representation of the source of the injury was the suggestion of the wife, it only serves to evince the great forgiveness of her disposition, her long forbearance, and her desire not to expose her husband.

These answers go far to corroborate and give credit to the evidence of Mackenzie. That witness, on the eleventh article, states, that they went for a few nights to the Duke of Leinster's country house at Carton; and then goes on, "In the course of the night, or early in the morning, deponent was awoke by Lady Westmeath's running into her room, followed by Lord Westmeath; she was flying from him, and he was coming after her to take her back to her own bed; she said she would not return; she told deponent, 'that he had been beating her;' he desired her to come back; she said 'she was afraid;' he continued, first ordering, and then begging, her to return; and saying, 'that the servants would hear them, and that he would not touch her again, if she would come back.' Lady Westmeath was apparently very much frightened at first. At length she consented to return; they went back, and deponent with them. The water jug had plainly been emptied in the fire, which had been so put out; the bed was in confusion; the clothes all pulled off and lying on the floor: deponent put that to rights for them, and then left them." These repeated acts of furious violence prove the character of his temper, on the point already noticed.

This concludes the transactions of 1814, and the confirmation of this witness will appear in the sequel. Lady Westmeath's letters in the remaining part of this year, 1814, are not very material: only two are exhibited, couched in the ordinary style of a wife to a husband, though, even here, the letter of the 14th of August, shows there had been disagreements; for she says, "you know very well, when we are friends, I never neglect writing to you:" agreeing therefore with Mackenzie and Wood, that at all times they had not been friends.

Under these injuries, personal and mental, that Lady Westmeath's health should have suffered, is not extraordinary; it is difficult to show the cause of ill health; it certainly does not follow that because *post hæc*, therefore *propter hæc*; but here is the fact, that her health was affected, and that she went to Dublin, in 1815, for medical advice, and was there under the care of three medical gentlemen. It is not probable, with her desire for secrecy, that she should communicate the cause of her illness, even to her medical attendants, and in writing to her husband whilst she was upon terms with him, and both were cool and apart, it would have been ungenerous, as well as imprudent, to have referred her indisposition to his treatment. Making light of her illness, and saying, "there was not much the matter with her," will bear an interpretation creditable to her judgment and forbearance; but the evidence of Lord Westmeath's friend Mr. Wood, unless all credence is denied to it, gives a different account of her state of health.

During 1815, the same species of differences seem to have continued,

and she began at length to entertain serious thoughts of a separation. In her letters of April, 1815, there are these passages:—No. 21 is dated April 3, 1815; and it appears from it that they had not been friends, and that some discussion respecting the woman and her children had taken place: it however begins kindly—"I do not know, my dear friend," and afterwards proceeds: "So much the better if you have not received my last, it would not have given you pleasure. I hope to hear from you to-morrow, that you are in good health, and that the detestable subject will be at an end between us until your return. It will depend entirely upon yourself whether we are for the future to live peaceably and happy together; and indeed, if you do not entirely get rid of the whole of that infamous gang, your good sense must tell you, that it is impossible for us to live together without making ourselves miserable. If I were indifferent, or if I desired that you should have your objects and engagements separately from mine, I should, indeed, be more of a Madame Commode: but as you know well that I have no other object in the world than you, I cannot endure such a want of sincerity towards me. I must have all or nothing. You know my opinion in regard to your conduct before marriage; and God knows that that discovery was sufficiently afflicting to me, without having further to discover all that has since passed in that respect; but let us make an end of it:—you have been the dupe of two wretches, the very dregs of mankind," [it appears that the woman had a husband], "and you and I have very nearly become the victims of our enemies, high and low, and this ought to be a lesson for us never to disguise any thing." She then goes on with affectionate cordiality, giving an account of herself and her daughter, expressing anxiety about his health and safety, and adding, "If any thing should happen to you, recollect that Rosa and myself are beggars." Lord Westmeath's father was now dead.

In the letter, dated April 8, 1815, there is the same disposition to kindness; but the same marks of her strong sense of injustice that are not discreditable to her. An intermediate letter had passed, to which this seems to be the answer.

"My dear friend. Much obliged by the letter I received yesterday. I am very glad that you received mine, and that you wish to live peaceably together. I assure you, my dear friend, that it is only when you break my heart, and mortify me to the quick, that I have any intention of abandoning you; and put yourself in my place, is it not enough to have had the mortification of discovering that you are, by no means, what I believed you to have been before marriage, without having to blame you for your conduct after it?" The remainder of the letter is civil.

There is nothing in these letters inconsistent with Lady Westmeath's case, or to her disadvantage, either as regards her temper, understanding, or right feeling. Her resentment is expressed as an honourable and injured wife would express it; she indulges in no terms of violence or reproach, and is ready to forgive if the injuries cease, and are not renewed. She does not, it is true, advert to acts of personal violence; but, to a woman of such mind and character, personal violence, inflicted in a moment of passion and irritation, would be easily overlooked, forgiven, and almost forgotten as soon as suffered: but mental injuries, such, to use her own expression, "as broke her heart, and mortified her to the quick," would sink deepest in her mind. Notwithstanding these sentiments, in

other parts of this very letter, she expresses herself in terms of kindness, conciliation and friendship, and appears regardful of his health and safety; so that her writing kindly is no disproof of her feeling injuries keenly.

In September in that year, 1815, the parties were coming over to England, intending to proceed to France, accompanied by Miss Wood, the daughter of their neighbour and friend at Rossmead. Before they left Dublin, a discussion respecting their differences took place at the Waterford Hotel; and Mr. Wood, as he had done on former occasions, acted as mediator between them, and gives the following account of that interview. "In September, 1815, deponent went to Dublin, a visit to the Continent being contemplated by the parties, accompanied by deponent's daughter. Lord and Lady Westmeath were at the Waterford Hotel. There was at that time a serious misunderstanding between them, and Lady Westmeath was threatening that she would proceed against him, and apply for a legal separation. Lady Westmeath enumerated various instances of grievous ill treatment and cruelty; the principal features were some particular acts of violence. He remembers, in particular, she gave an account, that about a fortnight after she was brought to bed, he had threatened to disinherit her child, and to settle his fortune upon his brother by the half blood; his discontent and anger at her not suckling her child; and his unkindness, violence, and cruelty to her. She mentioned his having beaten her several times; in particular, she gave an account of a violent beating he had given her at Leinster House: she described it as of a nature that she was severely bruised, and that she carried the marks for a long time, and that he himself had gone the next morning to Surgeon Crampton, and had procured a lotion, under pretence that she had fallen against an imperial; that the marks continued so that she was obliged to wear something to cover them." This is a complete corroboration of Mackenzie. "She also upbraided him with not having made the promised settlement on the children, as he had pledged himself to do on the death of his father. During this time, Lord Westmeath was walking up and down the room, apparently a good deal annoyed by the recital, striking his head occasionally, but acknowledged distinctly the truth of all she said. He did express regret and contrition for his conduct, and his wish to make her amends: and he, in a very serious manner, promised that he would fulfil his engagements in regard to the settlements, and that he would never repeat his ill-treatment of his wife. Upon this a reconciliation took place, and he left them reconciled." If then the witness is to be believed, and I have already said I see no reason for disbelieving him, his evidence is in unison with Mackenzie's account; and, what is more decisive, it is confirmed and admitted, not only by Lord Westmeath's whole conduct, but by his own letters. Here had been acts of cruelty committed sufficient to entitle her to a separation, if then demanded; but through the kind offices of Mr. Wood; from affection for her child, and, probably, affection for her husband not extinguished, she, with laudable forbearance, agreed to be reconciled.

Before the visit to France, Lord Westmeath went back from England to Ireland; and during his absence Lady Westmeath constantly wrote to him. There are six or seven letters written during that short period, which are exhibited: they are such as a reconciled wife would prudently and properly write to an irritable and violent husband: they are kind: no expression of reproach occurs in them; no reference to

what had passed in Ireland; but they furnish, in my judgment, no disproof whatever (for that was the purpose for which they were used) of injuries which it is alleged she had before suffered.

In December, 1815, the parties proceeded to France, accompanied by Miss Wood and Lady Westmeath's own maid, Janet Service, a Scotch girl, hired in Ireland in the early part of 1815. Mackenzie, who had married in 1814 and become housekeeper at Clonyn, remained there; Lady Rosa, the child, being entrusted to her care. The parties had a bad passage of seventeen hours from Dover to Calais, during which Lady Westmeath suffered much from sea-sickness, and Lord Westmeath was kind and attentive to her. It is not the result of the evidence that at that period, at least when he was in good humour, he was not kind, nay, that he was not extremely attached to her: but that fact only serves to prove more strongly the ungovernable force of his temper and passion, and the dangers consequent thereon. An instance occurred almost immediately. On their journey to Paris, they stopped at a place called Grandvilliers, and went to the post house: whether there was a better inn, at which Lord Westmeath would not stop because too much was asked for the apartments, is not material; the accommodation at the post-house was not very good; Lord Westmeath went down himself to procure some wood for the fire; on his return, the door being fastened (the room was also probably a bed-room), he was detained a short time. Whether any thing before had passed to put him out of humour, or whether the detention at the door, or something said upon his entrance, provoked him, need not be inquired, but he struck his wife a "violent blow," which not only hurt her, but seriously endangered her person; for, if not caught by Miss Wood, she would have fallen upon the fire-place, in a manner that might even have produced fatal consequences. The fact is proved by the concurrent testimony of Miss Wood and the maid-servant, Janet Service, who is since married, and has been long out of the employ of either party.

Miss Wood thus deposes, "She was standing by the fire, but was not looking that way at the moment when Lord Westmeath came into the room; her attention was suddenly roused by hearing a blow given, which, though she did not actually see struck, was most certainly given by Lord Westmeath, and at the moment when he struck her he said, 'Go to hell; I wish I had never seen you.' Lady Westmeath staggered, and was in the act of falling backwards, when deponent caught her; and, she being a very little woman, deponent was enabled to break the fall. In all probability she would have fallen with her head upon the dogs on the fire-place; the dogs being iron frames on which the logs of wood are laid: Lord Westmeath made no kind of effort to save her." Janet Service thus details the same occurrence: "deponent went with, or just following, Lord Westmeath into the room. Lady Westmeath said, as soon as Lord Westmeath entered, 'My God! Lord Westmeath, what a place is this you have brought us to!' whether he was angered by that, or what other cause, deponent knows not; but, going up to her Ladyship, he struck her a violent blow which would have knocked her down, had it not been for Miss Wood, who caught her falling, and said, 'Oh! Lord Westmeath, what a brute you are.' As Lord Westmeath struck her, he said, 'Go to hell: I wish to God I had never seen your face.' The blow for a time seemed to take away her Ladyship's breath; his manner was very violent and outrageous."

This, then, is an act of personal injury amounting to cruelty, according to the strictest demands of matrimonial law, and proved by two unimpeached witnesses. This transaction is the more important, because the Court sees the cause and the commencement of it. A wife, fatigued, coming in the evening to a French post-house, for so excusable an observation on the badness of the accommodation, and with no other provocation, is immediately treated in the manner just related from the evidence of the two witnesses. It serves to illustrate what was the sort of provocation he might have received, which produced those nocturnal violences in Ireland, when unrestrained by the presence of third persons, and when his only excuse is, "You provoked me to do it." It evinces a temper that inflames by the slightest spark, or rather that, by a mere jar, explodes with these dangerous effects. It is the duty of the Court, when it considers other acts, to bear in mind the species of temper which rules the person, who now demands to have his wife again placed under his marital authority.

The parties proceeded to Paris. Lady Westmeath was at first unwell, she afterwards became better, and was able to partake of the society and amusement of the place; but the same witnesses prove that there was the same general treatment; Lord Westmeath was frequently speaking in a loud angry tone, generally in French, so that Janet Service could not understand what he said, and Lady Westmeath was frequently in tears. Service says, "Though she could not understand his language, she could not mistake his manner; for that was violent and passionate, and frequently very unbecoming." Miss Wood thus describes his conduct during their residence abroad:—"She does not know that he sought occasions of quarrelling with his wife; but the slightest occasion excited his temper, which appeared to be ungovernable. She did not observe that Lady Westmeath provoked him, either intentionally or incautiously; she conducted herself prudently towards him: deponent has seen her angry, but then it was not unprovoked, and she uniformly endeavoured to hide their quarrels."

What their common acquaintance, and persons meeting them in society (Lord Arthur Hill and Lady Glengall) might observe, is of little weight. It is much to be feared that husband and wife, particularly among the higher ranks, who, from education and habit, have more command over their external behaviour, often appear to the world to be mutually civil and kind, when at home, by their own fireside, they are but ill at ease with each other; and that many a wife is often obliged to wear a countenance cheerful, and clad in smiles, who carries with her under it but an aching heart. + 271.

In the autumn of 1816 the parties came back to England; went over to Ireland for a short time; and then returned again to England. At the Pigeon-house, where they intended to embark on their return, there occurred a scene of unseemly conduct and opprobrious language, in the presence of the servants, which, though not attended with personal injury, was degrading, and strongly marked violence of temper. +

Soon after their arrival in England, in the beginning of 1817, an application was made to Lord Salisbury to advance Lord Westmeath part of a sum of money which would fall to Lady Westmeath at her father's death; Lady Westmeath joined in this request, and it is stated that she urged the compliance with it on the ground of Lord Westmeath's uniform kindness. This has been relied on as falsifying the charge of ill- + 430.

treatment; it does not weigh much with me against the body of proof adduced in support of the imputed misconduct: if she, in kindness towards her husband, or in some degree for her own convenience, comfort, and peace, joined in the application, and with earnestness—it is not to her discredit: if she alleged his uniform kindness in order to induce Lord Salisbury to consent to the advance of this money, the evidence satisfies me that she misrepresented the matter. At this period the parties resided in Saville Row, where their differences and unhappiness still attended them. Wetherly, the housekeeper, heard “Lord Westmeath violently storming at her ladyship, who, as it seemed to her, was crying very much.” Lady Westmeath at length applied to Mr. Sheldon, saying, “She could no longer bear it,” and a deed of separation was in preparation, and agreed to: Lord Westmeath in the meantime going to Ireland.

Mr. Sheldon states; “Deponent had repeated conferences with Lord Westmeath on the subject. It was agreed that a deed of separation should be executed, and deponent requested and urged his Lordship to employ some professional gentleman as his own legal adviser; but Lord Westmeath refused to do so, stating his entire confidence in deponent, and his disinclination that the matter should become known to other persons. Lord Westmeath left England, for Ireland, in the autumn, promising to execute the deed on his return. His Lordship previously expressed great reluctance to execute such a deed, but at length consented; it being the only condition on which Lady Westmeath then declined to persist in her resolution to seek a legal separation by divorce. Lord Westmeath distinctly and unequivocally admitted his violent misconduct to, and ill-treatment of Lady Westmeath; and so matters stood when his Lordship went to Ireland in the autumn of 1817.” It was at this time that the correspondence, to which I am now going to advert, took place.

It appears that Lord Westmeath, even before he left England, wrote to Lady Westmeath, endeavouring still to dissuade her from the separation, and that she answered his letters in terms of civility, but justifying the measure she had resolved upon by reference to the treatment she had experienced. Her letter, No. 30, was written in the latter end of September, 1817, and addressed to Lord Westmeath, at Leamington; it is produced by him, and is an important document in illustration of this cause. It contains an enumeration of the injuries of which she then complained, and was written, not for the purpose of reproaching and worrying him, but of justifying herself, in insisting at that time on a separation, to which he had agreed, but from which he was now endeavouring to persuade her to depart. It is not a letter written for the purpose of being shown to third parties, in order to make her own story good; but it is addressed to him alone, and it is he who has produced it in the present suit, after his letter in reply to it had been exhibited on the part of Lady Westmeath. Her letter, and his answers, are keys to each other. It is difficult to suppose that this letter would contain a misrepresentation of facts, it being addressed to the very person who must be fully aware of any falsehoods inserted in it; but it is still more difficult to suppose, if it did contain falsehoods, that having received this letter, and written an answer in justification of himself, in extenuation of his misconduct, and with a wish still to dissuade her from a separation, he would not have pointed out any circumstances

which she had either misapprehended or misrepresented; he would naturally deny, in excuse of himself, any accusations that were totally unfounded. In this view, it is extremely important to see the charges she makes against him in this letter to him; and the answer which he gives, in defence of himself, against these charges. Her letter contains the following passage:—"Many thanks for your letter, which I received this morning. I hope, dear Lord W. you will not torment yourself, or me, any more with discussions upon the painful subject of the causes of our unfortunate disagreement: there is nothing more to be said upon the subject, and all the fine words, 'refinement, delicacy,' &c. *ne changent rien à la chose*. When I say you neglected me, I ought to say insulted me personally; and now you are trying to insult my understanding also. You still attempt to prove that 'you had not even persons in your imagination, and that you only thought of me.' I will just put down a few instances of your attachment to me and forgetfulness of others. You first took me away from all my friends; as good as shut me up in an obscure corner of the world, without horses, or servants to stir out. In the bitter winter of 13 and 14, I was in a room not papered, sashes rotten; with child, and very ill; not allowed any thing but green wood for firing, because turf was two shillings a kish instead of one. When my child was twelve hours in the world, you told me you would be damned if you gave twenty-five guineas a year to a b—— of a nurse; why the devil could not I nurse her myself, though the doctor told you I was unable. Three weeks after the child was to be disinherited, and settle every thing upon Thomas. You took possession of my pin-money; would turn me out of doors if I dared to insist upon having it. You beat me; you endeavoured to place (I will call things by their proper names) a pimp's daughter as my own maid, her nephew, a post-master; and all this time, when I was undergoing all the privations I mentioned for want of money, you could find money for a prostitute; you could believe her word when she saddled herself and her children upon you, and did you the honour to tell you they were yours. You dared to tell me that you had injured her. You lived three years with me in constant deceit; at last, when your nurse's impertinence made it impossible to conceal the whole any longer, you made an agreement with me, and bound yourself by all that was sacred that there should be an end of the business upon conditions, God knows to that woman's advantage enough. Last year, when you returned from Spa, you began again and broke your most solemn word of honour; and you now dare to tell me that you never thought of any one but me. Lord Westmeath, I assure you I do not wish to speak harshly; but if you will persevere in asserting things that you know cannot be true, I must state facts to you. As to your anxiety to make up with me, the removal of the causes of disagreement was always in your power, but you never thought of that. In short, you thought (if I may apply the example to such a subject) that you could serve two masters; and you thought, that as long as you condescended to tell me I was your object, it was enough; I was to be satisfied with whatever you thought fit to do. You have been mistaken, and now, according to your disposition in every thing, you regret what you have yourself, with your eyes wide open, thrown from you.

"As to me, I freely confess that when Sheldon got me to agree to coming together again, I never was deceived with a hope of its ever

coming right again; I made the condition of those people being out of your reach, not because I did not well know that there were other *Frank Erwins* in the world; but because I owed it to myself, not with my positive knowledge to allow the slightest link of communication. The thing has failed, owing to the impertinence you have yourself taught the woman. To speak openly, nothing offends me more now than your persevering in saying you all along only thought of me. I wish Mr. Stephens to understand that the woman's being married"—

"What was owing to myself was, that, as far as possible, the thing should be as if it had not existed; if your word had been to be trusted there would have been no necessity of going out of the country; but remember your oath to me and them, and then ask yourself if you are to be trusted. Frankly speaking, I never will live with a man as his wife, who thought any other woman and her children had the slightest claim upon him. You and I are not intended for each other, and cannot understand each other. Rosa is very well, and sends her love. I hope Leamington will agree with you. Yours, in haste, EMILY."

This letter is certainly written in a tone of strong resentment; but, with her view of the injuries she had suffered, and her repeated forgiveness of those injuries, it does not, perhaps, exceed what a wife so circumstanced, and adhering to her determination of a separation, was justified in stating in support of that determination. Her complaints are here then distinctly enumerated to him, not before third parties, but in the privacy of a letter. How does he answer? By denying any of the facts? No! he points out an unfortunate coincidence in one or two circumstances which, he says, were accidental and unconnected: but as to the rest of the charges there is no contradiction; all is acknowledgment, self-abasement, and contrition.

The first letter is dated Dublin, October 5th, and contains the following passages: "My dearest Emily.—Although I would give up willingly the mention of the unfortunate unhappy state, as it is disagreeable to you, and indeed had intended it, yet your cold—worse than cold—your freezing letters go the length of incapacitating me, even for any part of the business I came about; I cannot raise myself from the paroxysms of anguish into which the hell of the style of your letters too surely acquaint me with, that I only live in your recollection to be detested. . . . I confess to you, Emily, that when I look back on the principal part of my conduct—that it was that of a person totally unworthy of such a friend. . . . my only hope now, in this life, is to have some of your regard, and to show you that I am full of remorse; but under your contempt and disregard I cannot live; I have, miserable and lost man that I am, too late the belief that the money those devils have been supplied with, was only fuel wherewith to torment me and mine hereafter; but that is, thank heaven, at an end: I trust you will know and believe it." Towards the conclusion, he says, "Poor little Rosa! her mother deserved to have had a husband of whom she could have spoken to her, as I fear you never can of me; but it is bad for her, poor little thing, that the best she can know of her unhappy father is not to have known him at all. May God bless you, and comfort you, for the blast I have made of your happiness." In this letter, then, he expresses contrition and deep remorse; but makes no attempt to gainsay the truth of the imputations made against him by his wife.

The letter, dated October 8th, has passages of the same tenor:—"If

existence has charms for others, there is nothing for me but dreariness. Kiss Rosa for her unhappy father."

The letter dated October 13th, comes next. "My dearest dear Emily, I am distracted, I am too miserable a wretch to live long; but, before I die, I hope to obtain your entire forgiveness." He then enters into an explanation about his property, and afterwards proceeds:—"As to my oath, broken as you say it is, I acknowledge actually it is; and, as I tell you, I feel too bitterly having compelled you, my dearest and best friend—you angel, who devoted yourself for me—to think so ill of me as you do, to live long. My state is absolutely intolerable, and, indeed, I do from my heart acquit you, for you deserved every thing the very reverse from me; I do however cling still to the hope, that when I am gone, you will try to forget your wrongs from me, and endeavour to forgive them here. I have not now an object on earth, and I only wish and pray to die." The rest of this long letter is very much in the same strain, and of the same character—all humiliation, sorrow, and self-reproach; but he ventures upon no denial of his misconduct, and concludes;—"Oh pardon and forgive me, Emily; what a comfort it would be to my very great wretchedness, to think that I was dear to you in any degree." Letter No. 5, has no date; but by the answer seems to have been written the following day. Some extracts from it have already been quoted, acknowledging specifically his unkindness and threats during her lying-in of her daughter. There are also these passages:—"At one time I fully determined to go with the child; and never see you again:—at another, to leave every thing with you, but go;—at a third, to destroy myself; but it is evident I can do nothing." Further on he says, "Let pity for my misfortunes induce you to relent, Emily: if I was not a worthy object for your compassion and pardon for much brutality I have shown you, in individual instances, I probably should not have the grace to ask it." He then, after a solemn protestation, says, "That, however disinheriting Rosa, and turning you out of the house, as it was threatened, coupled, as I truly see, in your mind with appearances of improper consideration for other persons than you, I say, believe me, on that great oath, when I say, they were coincidences of chance, and produced by misfortune to undo me."

This is the only part of Lady Westmeath's charges which he endeavours to explain, viz.—that he did not employ those threats for the sake of, and with reference to, the woman and children who gave his wife so much anxiety. He says, again, in disavowal of that reference; "As I loathe the unworthiness which would make the principal and foundation of all your charges against me, so I never could be at ease in my mind to have it fixed upon me." This, then, is the only part which he attempts to extenuate; but the individual instances of much brutality, as he terms them, and which Lady Westmeath had enumerated in her letter, he does not deny, which goes far towards a full admission of them.

Much in the same tone and feeling are the two following letters; but they were not received by Lady Westmeath till after the former letters had had their effect upon her heart, and she had consented to be reconciled. No. 6, dated October 19th, concludes thus: "For God's sake, believe me, my dearest Emily, my heart is worthy of your forgiveness, though I have wounded yours in its disinterestedness deeply; pray forgive me, and let me know how you do." Letter, No. 7, is dated

Dublin, Tuesday morning, and in it he says: "Thank God, Emily, I did not commit a last act of brutality and madness, by taking her (Lady Rosa) from you, who suffered twice what most mothers suffer, all through your time—mind as well as body. Oh Emily, will you—will you forgive me!" By sufferings of mind must be meant his treatment of her at that time; it concludes, referring to a provision for the child. "I am anxious to comfort your true heart, as far as I can, on a point that evidently afflicts you, and leaves a sting, even in poor Rosa's existence, towards you." Previous, however, as has been already stated, to the receipt of the two last letters, she relented. She was not inveterate and obstinate; she had strong inducements to keep up, if possible, matrimonial society; her daughter was still unprovided for; her friends were, and possibly she herself was, averse to make her separation known to the world. She might also be alarmed, lest he should commit an act of violence on himself, she therefore consented once more to try him, and, accordingly, on the 18th of October, 1817, writes the following letter: "I have received your two letters, on the 13th and 17th of October, and their enclosure. Let us say no more about it, *mon cher ami*. I shall be happy and willing to consider you in future, and if you can but permanently profit by all the misery we have gone through, I hope we may yet pass many years of comfort, and as if nothing had happened." This surely is no want of generosity. "On my part, I assure you I forgive you, and will sincerely try to forget; and on yours, I hope you will excuse any violence of words on my part; for, after all, in any case, it is as useless as it is unnecessary, for it proves nothing one way or the other; I will say no more on this subject at present." She then proceeds to matters of business, respecting his property, and requests he will not return till he has settled all his concerns in Ireland.

In his answer, No. 8, he makes the most faithful promises: "I am sure, my dearest Emily, my dear little soul, you will not expect me to describe my feelings at your last letter. After your feelings had been so much wounded, I confess I did not expect so great a blessing; I cannot be too thankful." He then promises what his future conduct shall be; and in answer to that part of her letter where she apologises for any intemperate words, he says: "But, indeed, indeed I do, on my part, entirely forgive any thing I ever had to complain of; I well know I brought every thing upon myself, by a bad outset; I changed you, and therefore you cannot be justly chargeable. I must not neglect to say that I shall be anxious to make arrangements, such as you must naturally desire, to secure you in case of any unfortunate recurrence. I do not like to mention that, but it is necessary for you that it should be mentioned, and that your mind should be quite at ease on so important a point." This was a right feeling of generosity and of self-knowledge, to guard against a recurrence of ill-treatment. And in answer to her expressed hope, "that he would permanently profit," he says, "You will be rewarded, I am sure, at the hands of providence for what you have done."

In consequence of this forgiveness, a deed of reconciliation is substituted for the articles of separation, by which Lord Westmeath contracts to make a settlement upon Lady Westmeath and her issue; but engages expressly, that if he renews his ill-treatment, she shall be at liberty to live apart from him; and this is said, and perhaps not improperly said,

to be a prospective deed of separation, and of no legal validity;(a) but it is, on the part of Lord Westmeath, a solemn act, fully acknowledging, in general terms, his past misconduct and ill-treatment of his wife; and in that view, as evidence of the deliberate admission of the conduct imputed, it is not unimportant.

It has been said, "that Lord Westmeath was *inops consilii*; that Mr. Sheldon was Lady Westmeath's legal adviser and attached friend;" but Mr. Sheldon states, that, in each of these arrangements, he earnestly pressed Lord Westmeath to call in professional assistance; that Lord Westmeath refused, being anxious that the transactions should be known to as few persons as possible; but that he took great pains repeatedly to examine the deed himself, so that whatever it contains was carefully considered, and advisedly agreed to. This deed bears date on the 17th of December, 1817, and recites, that the parties "were on the point of separating; but by the intervention of mutual friends, the said Countess had agreed to cohabit with Lord Westmeath, after he shall have executed these presents, and thereby made such provision for their issue, and also such provisional maintenance for the said Countess, as is hereinafter mentioned." After settling the property, then comes this proviso: "Provided always, and it is hereby admitted by the said Earl, that the said Countess hath agreed to live and cohabit with him on this express condition; that in case it shall unfortunately happen that, by a renewal of such differences as had nearly caused such separation, the Countess shall find herself compelled to cease to cohabit, and to live separate and apart from him." Then, after settling her provision, it goes on:—"but such separation is only to take place in case of ill-usage or gross abuse from the said Earl to the said Countess." Such, then, are the terms on which the reconciliation is effected. She consents to return to cohabitation, protected by this deed.

Pausing here, at the end of 1817, am I to consider the charge of cruelty established against Lord Westmeath? General violence of temper, and several acts of personal injury, are deposed to by three witnesses, Mackenzie, Miss Wood, and Service. The first speaks to what occurred in Ireland, the two latter to behaviour in France. These witnesses are corroborated by distinct parol admissions, proved also by three witnesses, Wood, Sheldon, and Stephens; still more fully corroborated by the correspondence, and by Lord Westmeath's own letters; and finally, by this very deed. On this body of evidence, I fully concur in opinion with the Chancellor of London, "that there is proof of cruelty sufficient to have entitled the wife to a separation, if such a sentence had not been barred by this subsequent reconciliation." But Lady Westmeath consented to be reconciled; the parties again cohabited, and she became pregnant. This return to cohabitation does certainly amount to a condonation, which forms a legal bar to a separation, on account of preceding cruelty.

The case then resolves itself into the question, whether any subsequent acts took place, furnishing fresh grounds of legal complaint, or at least reviving former wrongs; and, in connexion with those former wrongs, creating reasonable and just apprehension of a renewal of ill-treatment. This condonation has been termed conditional; but all con-

(a) See *Durant v. Titley*, 7 Price, 577, and *Roper on Husband and Wife*, 2d edit. p. 269. *et seq.*

donations are impliedly conditional, though it seldom happens that the conditions are so expressly declared as in the present instance. Lord Stowell, in the case of *Ferrers v. Ferrers*, thus describes condonation and its effects: "condonation is a conditional forgiveness, that does not take away the right of complaint in case of continuation of adultery, which operates as a reviver of former acts."^(a) In the present case, the condonation creates a bar; but it is a bar accompanied by circumstances rendering it an impediment as slight, and as easily removed by "a reviver of former acts," as can well be described.

The force of condonation varies according to circumstances; the condonation by a husband of a wife's adultery, still more, repeated reconciliations after repeated adulteries, create a bar of far greater effect, than does the condonation by a wife of repeated acts of cruelty committed by the husband. In the former case, the husband shows himself not sufficiently sensible to his own dishonour, and to his wife's contamination; and such reconciliations, often repeated, amount almost to a licence to her future adultery, so as to form nearly an insuperable and immovable bar; but the forbearance of the wife, and her repeated forgiveness of personal injury, in hopes of softening the heart and temper of her husband, and under the feelings of a mother anxious to continue in the care and nurture of her children, are even praiseworthy, and create but a slight bar, removed by the reasonable apprehension of further violence. Forbearance in bringing a suit even, on a charge of adultery against the husband, is thus noticed by Lord Stowell in that same case of *Ferrers v. Ferrers*. "It may not only be excusable but meritorious, in hopes of reconciliation; and there is a great difference between the husband and wife on this point."

72.* Cruelty, in almost every instance, must consist of successive acts of ill treatment at least, if not of personal injury, so that something of a condonation of the earlier ill treatment must in all such cases necessarily take place. But, on the present occasion, the wife bears long in silence; she endures injuries personal and mental. In 1815, they become so far intolerable to her feelings that she talks of separating, but forgives, and is reconciled. In 1817, she again insists on a separation, but after his letters—contrite—entreating—solemnly promising future kindness; on the execution of a deed, protecting her, as she vainly hopes, against a renewal of ill treatment; at the earnest solicitation of her husband; and with the anxious desire of her friends not to make their disagreements known, she consents to make another trial. Under such circumstances, the former injuries would be revived by subsequent misconduct of a slighter nature than that which would constitute original cruelty; and for this plain reason, that the apprehension of danger would be more easily and more justly excited. A bar the reconciliation undoubtedly would be, in case no further ill treatment of any sort took place; if, from that time, the husband fulfilled his promises; if he discharged his marital obligations in the manner which the law requires, and, as it expresses it, "by treating his wife with conjugal kindness," the law would not allow the wife, from mere fancy and caprice, again to separate herself. It could, as the deed correctly expressed it, "only take place in case of subsequent ill usage by the husband."

(a) *Ferrers v. Ferrers*, 1 Consistory Reports, 130. And, further upon the same case, see Vol. I. 781* *notis*. [3 Eng. Eccl. Rep. p. 334.]

But what takes place? In the month of May, the wife, notwithstanding her pregnancy, demands a separation; she will on no other terms abstain from a suit in the Ecclesiastical Court. The husband most unwillingly, but on her insisting, and in order to avoid meeting her complaint in a Court of Justice, agrees to a deed of separation, thereby confessing—and the parol evidence fully confirms this admission—that she was entitled to a separation, which was only “to take place in case of his ill usage or gross abuse.” This deed of separation, bearing date May 30, 1818, recites, “whereas Lord Westmeath, at the particular instance, and at the sole desire of Lady Westmeath, agreed to live separate and apart from her, and to allow such separate maintenance and yearly provision for her and her child, or children, as is hereinafter mentioned.” Then follow the provision and the usual covenants, that she shall live apart unmolested, and that he shall bring no suit or process to compel her to cohabit.

As a deed of separation upon mutual agreement, on account of unhappy differences, though containing a covenant not to bring a suit for restitution of conjugal rights, these articles would offer no impediment to the husband's present suit, but as evidence against him, necessarily implying a confession of ill usage subsequent to the condonation, they appear unanswerable, and are a strong acknowledgment that the *causus fœderis* had occurred. On that confession alone, coupled with the character of his temper and former acts, if the case had even rested here—if the parties had never met after the execution of that deed—I should have entertained considerable doubt, whether the husband was entitled to the aid of the Court to compel his wife to return; whether the Court would not, at least, dismiss the wife. It would be a new case, and at present I give no opinion upon it, as it may be unnecessary to solve that doubt; and if necessary to solve it, the full discussion of the point would be inconvenient among the mass of matter which composes the present suit; at all events, it is proper first to examine the remainder of this painful history.

The deed before the Court, dated in May, but executed in August, is not the only evidence of the subsequent ill usage; there is other proof both of his admissions and of his acts. In May 1818, Mr. Stephens came to England to furnish an account of Lord Westmeath's property, and to assist in arranging the separate maintenance. He, Mr. Sheldon, and Mr. Wood, had several meetings with Lord Westmeath on the subject, and they all speak to Lord Westmeath's admissions.

Mr. Stephens, on the twenty-third article, states, “Lord Westmeath wished to be permitted to cohabit with Lady Westmeath; she would not consent to this. Lord Westmeath admitted that he had given her cause to require and insist on a separation, if she were resolved so to do; and that, as she would not yield the point, his Lordship consented, though reluctantly, to the measure, and ultimately executed the deed aforesaid.” To the twenty-fifth article he deposes, “Lord Westmeath, after the execution of the deed, asked and entreated, and he did certainly urge strongly the request, that he might have a bed-room in Stratford Place, though quite distinct from her Ladyship's. Lady Westmeath objected to this; but Mr. Wood, Mr. Sheldon, and the deponent, having all recommended it, in order to conceal their separation from the world, Lady Westmeath yielded the point, and consented that his Lordship should be permitted to sleep in the house for a short time, till he should remove either to Ireland or to some foreign settlement,

his Lordship having asked such indulgence only for a short time, and being in expectation of getting some appointment abroad."

Here, then, were full admissions that his conduct had been such as to entitle his wife to a separation; he submits to it most unwillingly, and these were the means used, and the terms granted, in respect to his having a bed-room in the house.

Mr. Sheldon, on the twenty-third article, fully confirms this account. "After the deed of December 1817 had been executed, and Lord and Lady Westmeath had cohabited for a few months, her complaints of his ill-treatment were renewed, and her determination to be separated from him was again expressed. Various interviews and discussions took place between his Lordship, Mr. Wood, the Rev. Mr. Stephens, and deponent. Mr. Stephens was his Lordship's agent, Mr. Wood was present as the mutual friend of both; deponent renewed his earnest solicitation that his Lordship would employ some professional adviser on his own part; but he would not. Lord Westmeath was very reluctant to sign any deed, but Lady Westmeath was resolute; and Lord Westmeath, admitting as he did, the justice of her accusation against him, yielded consent, though he appeared to be seeking delay by various contrivances." And on the twenty-fifth article, he says, "Lord Westmeath laboured hard for permission to have a room in any house which Lady Westmeath might take, in order, as he said, to save appearances, as he was very desirous the world might not know he was separated from his wife. To this Lady Westmeath strongly objected, and made the most determined resistance to it. Lady Salisbury, who was very anxious to save appearances, and Mr. Wood, who acted the part of a friend to Lord Westmeath, united their influence with Lady Westmeath, and; after a considerable time, she reluctantly yielded her consent to his having a room in the house, provided the house was entirely under her controul, and the servants also, excepting his Lordship's valet. The deed was delayed some time, in consequence of this struggle. Nothing could be more explicit than Lord Westmeath's declarations, that he would be considered merely a lodger, having no right to cohabitation, and no controul, or authority in the house, or over the servants, being merely under the roof by sufferance."

After the month of May, then, there was no matrimonial cohabitation. The permission respecting a bed-room, thus obtained and thus accepted, forms no continued donation; it only shows that Lady Westmeath was at length induced to give way to the wishes and advice of her friends, though highly repugnant to her own feelings, and contrary, in my opinion, to her own better judgment; for, as matters have turned out, it was very imprudent advice.

It was argued that Lady Westmeath, by consenting to this arrangement, has shown that she had no apprehension of personal injury from the residence of Lord Westmeath in the same house with her, and that, therefore, she may safely return to him now; but surely she was then in a very different state of protection from what she was, or would be, while cohabiting with him as his wife. She was in her own house, surrounded by her own servants, having very little communication with Lord Westmeath, and, what is highly important, sleeping apart from him; for his more frequent acts of intemperate violence broke out in the night when no person was present. Under such an arrangement, she was exposed to much less danger than if they were living on the ordi-

nary terms of husband and wife. If this was a degraded and galling situation on his part, he had reduced himself to it by his own temper and passions, and he had solemnly bound himself, both by verbal promises and by a formal deed, to submit to it.

What, then, was his conduct after the separation in May? Did it show that reason and reflection had taught him to subdue the turbulence of his temper? Had he acquired more self-command? Had he become convinced that the best mode of preserving his character in society, and of regaining possibly even the forgiveness and affections of his wife, was by patiently disciplining his mind into coolness and self-control, and by strictly fulfilling the conditions which he had deliberately undertaken to observe? Or did his subsequent conduct rather show, that his passions had become, if possible, more domineering and despotic; that no engagements could bind him so as to controul them; and that, to place his wife again under his marital authority would, in all probability, expose her to a repetition of acts of ungovernable fury, and subject her to the risk of personal injury?

The instrument, originally signed in May, was a short deed of covenant, by which he engaged that, on a future occasion, regular articles should be executed; for there was then no time to prepare the latter, Mr. Sheldon being obliged to go into Yorkshire, and Lord Westmeath intending to visit Ireland. Before his departure Lord Westmeath took a most extraordinary step: he had desired a copy of the deed of covenant to be made for him; he went to Mr. Sheldon's chambers in his absence, and finding the deed had been sent to a stationer's to be copied, he proceeded to the stationer's shop, accompanied by Mr. Sheldon's clerk, who left him there. Learning, on inquiry, that the copy was not completed, he went away, and returned in half an hour. The copy being still unfinished, he again went away, returned a third time, and then, under pretence of assisting the stationer, a woman, in comparing the copy with the original, he got possession of the executed instrument, tore it, put it into his pocket, and left the shop. It would not become the Court to designate and animadvert upon this act in terms which it deserves. Lord Westmeath soon became aware of the impropriety of this outrage; he wrote twice to Mr. Sheldon, on his way to Ireland. When there, he communicated what he had done to his agent, Mr. Stephens, and became anxious to hasten back to England, in order to make the best reparation he could by executing a new instrument. The Court reluctantly notices this act; but it so strongly marks the ungovernable state of his mind that it would be unfit to pass it over without remark, as it forms another trait in what appears to me to be the principal feature in the case. A new deed is prepared; not a mere deed of covenant, but full articles of separation, and is executed in August, but is ante-dated the preceding May.

During his residence in Stratford Place—allowed only in the manner already stated by the witnesses—Lord Westmeath, according to the account given by the two female servants, Johnson and Wetherly, was frequently quarrelling with Lady Westmeath, speaking in the French language, and appearing in violent passions. Such is the manner in which he used the indulgence he had obtained of having a residence in the house, in order to save appearances.

In the month of November of that year, Lady Westmeath was delivered of a son, of whom she became pregnant before the separation. Even

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that situation could not protect her from his temper; for, as Johnson deposes, "Lord Westmeath quarrelled violently with her Ladyship, and was in a great passion, which she, the witness, on account of her time, thought particularly cruel and brutal." That is just before, or just after the confinement, which is an aggravation. Johnson also states that, during her confinement, "Lady Westmeath was greatly in want of money, even for the clothing of her infant;" and Mr. Stephens mentions, that about that time he received a letter from Lord Westmeath, directing him to pay no more money to Lady Westmeath. It is true that Stephens adds, "very speedily after, if not the very next post, it was followed by another letter, desiring the deponent to pay no attention to the former letter." But such a step, at such a time, in direct breach and contravention of the deed he had entered into, shows the intemperate passion of Lord Westmeath.

In the beginning of 1819, Lady Westmeath removed to Bolton Street; and, painful as must have been the treatment she experienced from her husband, she did not violate the agreement she had been prevailed upon to make—of allowing him a bed-room in the house. For some time she admitted him to take his meals with her, and in order to keep up appearances in the world, she occasionally went with him into public, and to parties; but, in April, she thought it necessary to her peace to decline dining at the same table.

It is manifest, from the history, that Lord Westmeath had about this time, worked himself up into a determination of using all the means in his power to put an end to the deed of separation, and to resume the management and controul of the house and servants. On Good Friday, 1819, as it comes out in an interrogatory addressed to Mr. Wood by Lord Westmeath, he rushed into the house of Mr. Wood, one of the trustees, and, as he states it, "in a violent rage, holding up both his fists at respondent, demanded, in a lofty tone, whether respondent had not received things which had been taken out of his house? Respondent replied, that Lady Westmeath had asked respondent's leave, the night before she left town, to send some things to his house, to which respondent had consented, and they were accordingly sent. Upon which Lord Westmeath said, I am answered; and immediately left the room, with the same rapidity and violence he had entered it." He afterwards sent a friend and relation, to require an explanation respecting some expressions that had passed. Upon this transaction again it is only necessary to observe, that though no act of personal ill-treatment to his wife, yet it marks his extreme violence and how entirely he was under the dominion of passion.

About this time, Johnson, Lady Westmeath's maid, speaks of his general conduct. She also relates an occurrence which took place soon after, and was apparently the sequel of this strange interview with Mr. Wood. "Violent disagreements took place in Bolton Street; that is, violent on the part of Lord Westmeath, sometimes in her Ladyship's room, sometimes in the passage. She has heard his Lordship storming at her Ladyship's door, when he could not get in. His Lordship usually began in French; but when he had worked himself up into a rage, which he did not unfrequently, he would change to English; and deponent has heard him, on such occasions, use terms which convinced her that the deed of separation was the cause. He used to threaten that he would assume his rights again, and be master,

and that he would bring down her little Ladyship to her proper level, and show her to the world in her true character; frequently, when speaking in French, his Lordship's hurried, angry, loud tone of speaking, all over trembling with rage, and his whole manner showed how violent he was: and his passion was excessive at all times. Lady Westmeath was commonly calm; though deponent does not depose that her Ladyship never was provoked to anger—for she was sometimes, his conduct being more than could be borne—yet he was the aggressor whenever deponent had the means of witnessing the commencement of the quarrel. On one occasion his Lordship found his way into her Ladyship's bed room, when she was dressing for an evening party: deponent was dressing her. He began in French. Her Ladyship said but little, and in a calm unirritating manner: he became more and more angry; he could not govern himself at all; he was quite in a frightful rage, and stormed and raved like one that was mad: he proceeded after some time in English; it was against Mr. Wood: called him all sorts of names—a scoundrel, villain, blackguard, bogtrotter; said he would challenge him, and make him fight here or in France: that one of them should bite the dust: and, throwing himself on the floor, he swore (for he used quantities of oaths all the time), that if he had not a leg to stand upon, he would shoot at him as he lay. Deponent did not leave the room, as it was a general order to her, from Lady Westmeath, never to leave her when Lord Westmeath came into her bed-room. It ended by Lord Westmeath bouncing out of the bed-room. Lady Westmeath was, as deponent believes, very much terrified; she had all the appearance of being so; and indeed it could not be otherwise, his passion was so violent. This was, as deponent believes, about May, 1819.”

Here, again, it is only necessary to observe, that this conduct created just ground of terror, though the menaces are not directed against his wife; yet the rage is so extreme as to expose her to danger. An unguarded expression, or misapprehended word, might have changed the direction of his vengeance, and brought it upon herself; more especially if the servant's presence had not restrained him. Looking back to the whole history—for the Court is not at liberty to disconnect the transactions, if it wishes to do justice between the parties—I cannot think that the law imposes on the wife the obligation of continuing, or that she could safely continue, in matrimonial society with a husband who, up to this period, had so conducted himself.

The only remaining transaction necessary to be examined is that which took place in June, and induced Lady Westmeath to withdraw from her house, leaving him in possession of it, and thus finally breaking off all intercourse with him.

In furtherance of his plan for the resumption of the domestic government, he, on this day, demanded of the housekeeper what wages were due to her, and required her to deliver up to him her books and papers. This she refused, on the ground that Lady Westmeath, whose servant she considered herself to be, was absent at Mr. Wood's, in a neighbouring street. On this refusal, Lord Westmeath broke open the housekeeper's presses, and took forcible possession of all her papers, and whatever he found therein. The conduct of each of the parties will be more correctly described in the words of the witnesses; or, at least, by abstracting the most material parts of their evidence. Johnson speaks to the earlier part, and afterwards to the conclusion of the scene. She

mentions, that while they were at dinner in the housekeeper's room, Lord Westmeath looked in, and desired Wetherly to come to him after dinner: "from his manner she judged something was the matter; she went to her own room, Lord Westmeath came there, and asked where the housekeeper kept her accounts and keys? she said she did not know; he was apparently very angry and disturbed. In a little while deponent heard a great noise below, as of bursting open locks and bolts violently—a crash; she was alarmed, and staid where she was, till called down stairs by Lady Westmeath's voice." Wetherly then gives the following statement: "After she had dined she went to Lord Westmeath, as he had desired; his Lordship spoke to her in the dining room; asked her what wages were due to her, she told him how many months; he said he was going to pay and discharge her; desired to have the books, keys, and accounts: deponent told his Lordship she was Lady Westmeath's servant, and could not give them up unless she was present, and ordered her. His Lordship was in a great passion, flew out at the deponent, called a man servant, and sent him for a constable; said he would take them; he turned from her; she was just by the door, and as he had used personal violence to her once before, she did not know but he might do it again, so she made her escape, and got out of the house; she went to Clarges Street, to Mr. Wood's, where Lady Westmeath was, and did not return to Bolton Street for about eleven days, when she went to fetch her own things, when his Lordship returned some letters and papers which were her own property, and some money which belonged to her."

The next witness, who speaks to the same affair, is Miss Weldon, who had been governess in Mr. Wood's family, and who returned to Bolton Street with Lady Westmeath on this occasion: "Deponent accompanied Lady Westmeath to Bolton Street; when they got there, Lady Westmeath went immediately into the housekeeper's room, followed by the deponent. Immediately afterwards Lord Westmeath entered. It was plain the presses and drawers had been forcibly opened. Lord Westmeath was in a most violent and extraordinary passion, amounting to almost fury, though apparently in a degree exhausted; he was as pale as a sheet of writing paper, his lip quivered, his whole frame shook with rage, his shirt collar unbuttoned, and his whole appearance that of a man greatly agitated and irritated. Lady Westmeath asked him, with greater coolness than she could have expected, what he had been about; Lord Westmeath replied, his voice tremulous with passion, I have been breaking open your presses, and I will do it again. I will show you that I will be master in this house. Lady Westmeath said, that if she was to be exposed to such horrors, she must send to her trustees for protection. Lord Westmeath said, he should like to see the trustees that would dare to interfere with him. Upon this, Lady Westmeath left the room; she was followed by Lord Westmeath: deponent remained in the housekeeper's room. In about ten minutes Lord Westmeath came back, and said, as he supposed she was there as a spy, he must desire her to quit the house. She expressed her readiness, if Lady Westmeath consented, but otherwise she would not go. Lord Westmeath left the room. Lady Westmeath came there, entreated deponent not to leave her, saying she would come back to deponent in a few minutes; after being absent about a quarter of an hour she returned." They waited in the drawing room till her solicitor, Mr. Talbot,

came; and having consulted with him, they went to Mr. Wood's house in Clarges Street. "Lady Westmeath was certainly under alarm, and terrified, as it appeared to the deponent, but preserved her presence of mind. She was cool, and spoke calmly; but it appeared to the deponent evident, that she did not consider herself safe in the house in Bolton Street; or under the same roof with Lord Westmeath; and deponent saith that, as far as she could judge, her alarm was well founded."

A short passage in Johnson's evidence concludes the narrative. "On being called by Lady Westmeath, she went to her in her bed-room. Lord Westmeath was with her ladyship; he said, on deponent's coming in, what do you want your maid for,—as a witness against me? Lady Westmeath said, whenever she had occasion for her, and wanted her, she would call her; and she added, I desire, Lord Westmeath, you will leave my room. Upon which, he said he would not; that he would come into her room when he pleased, and stay as long as he pleased; that he would have no more of these separate doings; that he would be master of his own house; that he would go down stairs and turn Miss Weldon out of the house, and would have no more interference from that family in his concerns, and then left the room, apparently to execute his purpose on Miss Weldon. Deponent then assisted her mistress in moving her boxes, which had papers in them, and other things, to deponent's room, where Lady Westmeath filled her pockets, gave deponent as many as she could dispose of about her person, dispatched deponent to seek the children, who were out walking, and send them to Lady Salisbury's, for whom deponent received a note, and she then left the house. That on the occasion deposed of, Lady Westmeath was undoubtedly very much alarmed at his Lordship; the whole scene was very alarming. Lady Westmeath is a woman of wonderful self-possession, but she could not conceal that she was alarmed on the occasion."

Here, then, the scene closes; and the Court is to decide whether, under all the circumstances of the whole case, Lady Westmeath was justified in quitting cohabitation. Without recapitulating the facts of this painful history, which the Court has gone through with much detail, in order to mark distinctly the grounds upon which its conclusion must rest; but looking to the ungovernable violence of this husband's temper on these several occasions—looking to the former acts into which that temper had betrayed him—looking to his conduct at the separation of beds in May 1818—looking to these final transactions in the face of all his engagements—his resumption of his marital authority by forcible means—his refusal to quit her bed-room—his declaration, "that he would come into her room when he pleased, and stay in it as long as he pleased, that he would have no more of these separate doings," I do think that she had a reasonable foundation for an apprehension of renewed personal violence. I so far join in that apprehension as to think, and be morally convinced by the evidence, that if she had submitted to a continuance of domestic society under those terms, and had allowed of further matrimonial cohabitation, there was great risk, and a strong probability, that she would have been exposed to a repetition of acts of personal injury. I am of opinion that the case fully comes up to the requisites of the law, as laid down in the several adjudged cases to which I have referred, and more especially, to use the words of Lord Stowell, "that the passions of the husband are so much out of his own

control, that it is inconsistent with the personal safety of the wife to continue in his society."

If such was her danger at that time, has the Court any reason to conclude, that she would be in a state of greater security if compelled now to return to his house and home? Has he shown that he is become sensible of his past misconduct? Is he *emendatus*? Are his mind and disposition softened down into conjugal kindness? Where are the proofs of it?

357. After the separation, he carries his infant son to Clonyn, where the child dies just before he becomes a year old. Lady Westmeath, on hearing of the illness, with the natural feelings of a mother, sets off, accompanied by Lord Cranborne, her brother, and her maid, but arrives the day after the child died; she stays a few hours, and returns to England.

357. Till 1821, Lady Rosa, then about six or seven years of age, had been living with her mother, and in charge of a governess. In that year Lord Westmeath was residing at Mrs. Winsor's, in Bolton Street. The child is brought frequently by the governess to visit him; and one day the child is detained by Lord Westmeath, the governess dismissed without her, and in about ten days the child sent out of town, to a friend's house in Hampshire. This seems to have been done without the least notice, or previous preparation of the mother for the infliction of such a stroke. She applies to a Court of Justice to regain the possession: but the rights of a father are too strong to enable that Court to afford her any relief. His Lordship not only still persists in the same course, but will not allow Lady Westmeath even to see the child, or at least would not as late as the year 1824; for his own witness, Lady Salisbury, who was examined in March, 1824, and who was most likely to be correctly informed as to the fact, states, on the twenty-first interrogatory, "that respondent believes, that the producent, Lord Westmeath, has prohibited the ministrant, Lady Westmeath, from seeing her child, Lady Rosa Nugent, and has prevented her from so doing." Of the reason for this course of conduct respecting the little girl, the Court may not be fully apprised; but, judging from what appears in the suit, the smallest speck is not attempted to be pointed out in the moral character of Lady Westmeath. Indeed, the very prayer, made in this suit for restitution of conjugal rights, to compel her to return to cohabitation, implies necessarily, that he has no imputation to make against her, either as a wife, or a mother. The Court does not venture to blame Lord Westmeath in this respect, because all the facts are not before it; but as far as does appear, his conduct, in this particular, furnishes no affirmative evidence that he is disposed to show greater kindness and forbearance towards this lady. The Court carries the inference no further.

x Again, the parties have been engaged in litigation with each other from the moment of separation to the present time; not in one court only, but in all courts—in equity, common law. and ecclesiastical courts; and in those several jurisdictions, Lord Westmeath has been the party commencing the proceedings. These circumstances are not likely to engender more good-will and cordiality; they do not operate as sweeteners to prepare the parties for the performance of matrimonial duties with affection and consideration.

Looking, therefore, to the present time, as well as to the time of their actual separation, I see no prospect of their practically living together in

any degree of conjugal happiness, and in the proper discharge of the obligations of the marriage state; but looking at the case not practically, but strictly in a legal view, I am of opinion, that to compel the wife to return to cohabitation, would but expose her to the risk and danger of renewed violence, and personal injury.

In arriving at this conclusion, I trust that I have proceeded with due caution, weighing and considering again and again every transaction, with its accompanying circumstances, and every branch of the evidence in proof of them, and endeavouring to draw impartial inferences from the whole. I have formed my opinion, not only with the usual care and attention which the ordinary justice due to the parties would require, but with considerable hesitation and unaffected diffidence, on account of my respect for the learned Judge who, in this case, has come to a different decision; but after mature deliberation, finding myself compelled to dissent, on this latter part of the case, from the judgment already given, I must not shrink from the duty which is cast upon me of reversing the sentence: for to shrink from the discharge of that official duty, would be to defeat the very remedy by appeal which is afforded by the law.

I must, therefore, reverse the sentence; pronounce that Lady Westmeath has sufficiently proved her first allegation, charging her husband with cruelty, and is, on that account, entitled to a sentence of separation.

This sentence was affirmed by the High Court of Delegates, to which Lord Westmeath appealed, on the 18th of April 1828; and an application for a Commission of Review was rejected on the 24th of June, 1829.

MIDDLETON v. MIDDLETON.(a)—p. 134.

In a suit for separation by reason of the wife's adultery, (publication having passed), the Court—on an affidavit that material facts are newly discovered, may, in its discretion, allow the cause to be opened for the purpose of pleading further adultery.

The renouncing all further allegations, unless exceptive, is the virtual conclusion of the principal cause as to the rights of parties: leave for further pleading is in the discretion of the Court.

In suits for adultery the party is not limited to the contents of the libel, but may plead fresh charges, and obtain a sentence on facts not existing at the commencement of the suit; but publication is a bar to further pleadings as of right.

The Court is not legally obliged to defer to an appeal till an inhibition is served; nor is there any distinction whether all the acts be done on the day the appeal is asserted, or some on a subsequent day: therefore, the Court having overruled the objections to the admission of an allegation, on the following Court-day admitted the allegation, notwithstanding an appeal had, in the *interim*, been asserted.

Material facts, newly come to the knowledge of the party, may be pleaded after publication.

Before a party can plead after publication, he must show (generally by affidavit) that the facts came to his knowledge since his former plea; the Court then ought to admit a plea of such facts.

THIS was a suit, brought by the husband against the wife, for adultery.

In Trinity Term, 1793, the libel; on the third session of Hilary

(a) Vid. *sup.* Hamerton v. Hamerton, (Arches, Mich. T.) p. 17.

Term, 1794, an allegation, on the part of the wife; and, on the 5th of June, in that year, a responsive allegation on behalf of the husband, were admitted. On the third session of Trinity Term, 9th of July, 1794, publication was decreed; and, on the fourth session, both Proctors declared, that they gave no allegation unless exceptive to the witnesses; and, on the by-day after Michaelmas Term, viz. the 5th of December, an exceptive allegation, given in by the wife, was admitted. On this exceptive plea, publication of the depositions had not been prayed, nor had the cause been concluded, when on the second session of Hilary Term, 1795, the Proctor for the husband brought in an affidavit of Mr. Middleton and himself, stating, "that since the publication of the depositions, evidence of certain facts of adultery had come to their knowledge," and they prayed the cause to be opened for the purpose of giving an allegation in the principal cause. This was objected to on behalf of the wife; and the Judge assigned to hear, on act on petition, on the next court-day. On the third session, this assignation was continued; and the allegation being brought in, the Court further assigned to hear on the admission thereof on the fourth session, if the petition did not obstruct.

On that day, after hearing Counsel on both sides, the Court thus delivered its opinion.

JUDGMENT.

Sir WILLIAM SCOTT (Lord Stowell).

I see no foundation for any imputations of delay on either party: the citation was taken out in Easter Term, 1793; a libel, containing a large mass of matter, was given in on the first session of Trinity Term, and it is said that seventy witnesses have been examined: the production of so many, and these too on commissions in the country, did not exceed the usual allowance of time. The wife gave in her allegation early, and proceeded with great dispatch in the examination of her witnesses, and a responsive allegation was brought in on the 5th of June, 1794. The parties subsequently renounced all further allegations, unless exceptive, which, undoubtedly, is the virtual conclusion of the principal cause, as far as the rights of parties extend. They cannot retract without the leave of the Court; and the question is, whether the Court, in its discretion, shall under the circumstances listen to the application and allow the party to plead.

The allegation I have not seen; but the affidavit, sworn to by Mr. Middleton and by his Proctor, states, "that since the responsive plea has been given in, Mrs. Middleton, while residing at Lowestoff, has been observed to carry on a secret intercourse with a stranger of low condition, who had no acquaintance but her servants; that they had reason to suspect that this was the person mentioned in the proceedings as the adulterer, but they could not obtain the proofs till January; that they had since ascertained that the stranger was the alleged adulterer, and they had now collected facts which they believe are relevant and proper to be introduced, and that they are confident they shall be able to prove the same."

No doubt these matters are relevant, and that the party had a right to plead them before publication on the strictest principles of law and justice. It is every day's practice to introduce charges of adultery com-

mitted since the institution of the suit. It cannot be contended that a party is bound down to the contents of his original libel. In *Newton v. Newton*, Consistory 1781—See *Webb v. Webb*, Vol. I. 349. [3 Eng. Eccl. Rep. 152],—and many other cases, it has been constantly held, that fresh acts of adultery may be pleaded supplementarily; and that a sentence may be obtained on facts not existing at the commencement of the suit. The bar, in this case, would be publication, and it operates to prevent the *right* of further pleading; which would be a dangerous proceeding, if assumed as a matter of absolute right. But the question is, whether it be not proper for the Court, in its sound and legal discretion, under the circumstances of the case, to grant the permission prayed for; and acting not from favour but from justice, to open the cause. It cannot be denied that the facts are material to the investigation of the question. If the wife has carried on a clandestine intercourse since the commencement of the suit, it would be explanatory of much obscurity which appears to hang over the cause on the face of the libel. What danger or injury can there be to the wife?

It is asked, where is the matter to stop? At that period where the proper and sound discretion of the Court will limit it. Does it follow that I am bound in like manner to admit twenty other allegations? I am to look at the circumstances and stage of the cause, and to form my judgment upon all. Two pleas only have hitherto been given by Mr. Middleton; one of them being responsive: and the facts now pleaded are such as, if publication did not withstand, the Court could not hesitate to admit. Now, the grounds on which in point of law publication is a bar, are, first, the fear of subornation; secondly, the danger of the prolongation of the suit. Here are fresh facts to be proved; and, I presume, fresh witnesses to be examined: it is not proposed to supply the defect of the proof of the former pleas; but to establish facts having no existence at the time the libel was given in; and, therefore, there is no fear of subornation. The other ground of objection is the prolongation of the suit. I am told, however, these facts might be pleaded in the Court of appeal, or that the husband might proceed on a new citation, dropping this. Where would be the advantage or convenience in driving the husband to an appeal, or to a fresh suit? How would the wife be taken out of peril and discomfort? I think I shall perform an act of justice favourable to the wife, in suffering the cause to proceed in its present course to a complete termination. If these facts cannot be proved, her character will be vindicated; if proved, the Court will have the satisfaction of administering justice with full information, which satisfaction it would be difficult to feel under the confusion with which the suit set out. It, besides, is an allegation on the part of the husband, from whom there is less reason to fear protraction, as he is in a great measure to sustain the expenses; and I therefore have all the assurance from the situation of the parties, that he is sincere in the purpose for which he offers the allegation. As to myself, when I recollect the extreme obscurity which appeared in the original case, and the quantity of evidence produced, the introduction of this new matter will be a great relief. I owe it to my own conscience to give the case every instruction I can; and, I think, this allegation, and the evidence produced upon it, will contribute to throw great light on the real state of the facts, and I am convinced it will materially serve

the interests of truth. I, therefore, am clearly of opinion that I ought to receive the allegation. (a)

From this decree, and from a further decree, admitting the allegation, an appeal was prosecuted to the Court of Arches; when, after argument, the Court gave sentence, as follows:—

JUDGMENT.

Sir WILLIAM WYNNE.

The libel was, in this case, admitted in 1793. Many witnesses were examined: an allegation of the wife and a further allegation of the husband were given: the depositions on all these pleas were published: an

(a) The objections in the petition being thus overruled, the assignation “to hear on the admission of the allegation was continued.” On the by-day the proctor for the wife alleged the cause to be appealed: and, at the same time, the Court was moved to admit the allegation.

Dr. Nicholl and Dr. Laurence for the husband.

The hand of the Judge is tied effectually only by an inhibition: here none has yet been served. There are instances where, notwithstanding an appeal *apud acta*, the Judge has gone on, admitted an allegation, and decreed a requisition for the examination of witnesses. In *Annesley v. Aylmer*, Prerogative, 1790. S. C. Delegates, 1791. The cause stood on act on petition. Stevens prayed further time to give in an affidavit: this application was rejected, and the Court, Sir William Wynne, directed the cause to proceed. Stevens appealed *apud acta*. But the Court heard the petition and decreed administration. Oughton, tit. 306.

In *Barwell v. Barwell*, Prerogative, Hil. T. 1792. Willis propounded a will, exhibited an affidavit of scripts, and brought in an allegation (of which he had offered a copy to Stevens) and prayed it to be admitted. Stevens objected, and appealed *apud acta*; but the Court, Sir William Wynne, ordered the allegation to be read, admitted it, and decreed a requisition for the examination of witnesses. This is a case in point.

Per Curiam. What was the gravamen there?

Argument resumed. The Court ordering the allegation to be read.

No distinction arises from this being a case in which the Court exercises a discretion in respect to the admission of a plea, it being after publication. If the Court sees that delay is intended by the adverse party, it will now, in its discretion, admit this allegation. The step taken in overruling the petition was only preparatory; the allegation might have been admitted on the last session.

Per Curiam. Why was it not then brought on?

Argument resumed. Merely for the convenience of the Counsel on the other side, that they might look over the allegation, and see if it were opposable. It was therefore, in fact, admitted *nisi*, on that day; and we are now entitled to that which was then virtually the decree of the Court: the plea was allowed, if admissible, to be admitted. What can be the injury to Mrs. Middleton? The expense will fall upon the husband, and the wife will have an opportunity, in the Superior Court, of considering whether the allegation be objectionable; while, on the other side, a great injury might arise: the wife might appeal further on the same grievance, and might thus hang up the cause for a very long time.

Per Curiam. As I understand, this allegation was brought in on the Court-day, before last; a copy tendered to Mrs. Middleton's proctor, and the assignation stood “upon admission next Court, if the petition did not obstruct,” and that petition was overruled; therefore, regularly the allegation ought then to have been debated. Why that was not done, I do not know. If the opposite party would not accept a copy of the allegation, Mr. Middleton's proctor might then have read the plea, subject to the observations of the Court. The wife's proctor alleges that the cause is now appealed.

Dr. Swabey. This is not an appeal *apud acta*, as in the cases that have been cited. Here the proctor alleges the cause in due time and place to be appealed, which is different. By the canon law every act is appealable. On the last Court day the petition was rejected, since which an appeal has been entered from what was then done. In other cases the appeals have been *apud acta*, interrupting the Court in what it was then doing; and in those cases the Judge has gone on, and sent the whole cause together to the Court of appeal. Where an appeal from a separate act has been entered out of Court, the Judge has usually deferred. In *Raybold v. Raybold*, Arches, Mich. Term, 1789, the Court made such a distinction.

exceptive allegation of the wife was also admitted; and another by the husband was asserted. The cause was in this state, when an affidavit of the husband and his Proctor averred that facts had lately come to their knowledge; and a prayer was made, that an allegation might be admitted, it having been before declared that neither party would tender any such plea; the Judge of the Consistory Court was of opinion that they might give such a plea. From this decree the wife appealed; and the question for my decision is, whether the Court below exercised a proper discretion.

Most certainly, the Court is exceedingly cautious in admitting any plea after publication: there are strong objections which it is absolutely necessary for the party to get over; it would lead to subornation—witnesses might supply defects, might avoid contradictions, might make artificial evidence: these are evils which the Court will strive in every possible way to prevent, and it therefore always requires strict and legal proof that these evils cannot happen; it must be shown that facts have come to the knowledge of the party since his former plea: this is always demanded, and is usually done by affidavit. The Court has the power, on such affidavit, and always does and ought, for the purposes of justice, to exert its authority in admitting a plea of facts, which, for want of being known, could not be pleaded before. Where such facts and such former want of information are shown, the Court, I take it,

Per Curiam. What is the disadvantage to Mrs. Middleton?

Dr. Swabey, as amicus curiæ, I know of none. The petition stated the substance of his allegation: the admission of the latter can therefore scarcely be said to make the charge public.

Per Curiam. This case comes within the principle of the cases cited. The Court is not, I think, legally obliged to defer to an appeal till an inhibition is served, nor, in my opinion, is there any sound distinction, whether all the acts be done on the day on which the appeal is asserted, or some on a subsequent day. Generally the Court will be inclined to defer, unless circumstances afford a reason against it. It is, then, for the Court to consider, whether in order to do justice between the parties, it shall, in its discretion, defer to the appeal or not. The husband had a right to have his allegation debated on the last session: this forms a fair equity on which the Court may proceed. The party, offering the allegation, will bear the expenses: he tries the experiment *suo periculo*; and I do not see in what way the interest of the other party is concerned to prevent it.

Another consideration weighs with me,—the great and incurable grievance in these Courts that parties may appeal from every step, and that causes, by the occupation of the Court of Delegates, may be hung up long before an interlocutory decree can be pronounced. The Court will, in practice, consolidate the steps as much as it can, and will not drive a party to two appeals. Shall the Court, in this case, send up the party on an appeal against overruling the objections to the petition, and then, a second time, against the admission of the allegation? I hold it my duty to facilitate and expedite causes as much as I can, and to go as far as I can without breaking in upon the authority of the superior Court. I therefore think I am at liberty to hear this allegation read, and to admit it if it appears admissible.

The allegation was then opened and read *in panam*.

Per Curiam.

The act on petition stated, that facts of an adulterous intercourse had newly come to the knowledge of Mr. Middleton, who prayed leave to give an allegation; and the Court thought itself bound in justice to all parties to grant permission. I should have done Mrs. Middleton a great injury if I had not given her an opportunity to clear her character from every imputation, so that I might proceed to the final hearing, or even to dismiss her without any drawback on her character. The allegation, now read, agrees with the statement of the petition; but, as I understand that Mrs. Middleton has appealed, I admit the allegation only in order to send it up to the Court of appeal: and I, therefore, make no observations, except that I think a responsive allegation would have been a more advisable step on the part of Mrs. Middleton, than an appeal.

Allegation admitted.

will never shut its ears; for otherwise it might give sentence, when it knows that the party could possibly give a good reason against it. Where this danger is removed, there is only one other reason against admitting such a plea, namely, delay, or want of proper diligence: but here there is an affidavit of the party and his proctor (which is always held sufficient), by which it appears from the date of the facts that they could not be within their knowledge. Only one fact is pleaded in 1793, and without here stating that fact, it is clear that the rest occurred in August, 1794, that is, since publication, which passed in July; therefore it is most evident that they must have come to the knowledge of the party after publication.

The question then is, whether the Court below did right in admitting this plea of facts undoubtedly material, and strictly applicable to the cause. Shall the Court, then, be barred from receiving such, when the party lays them before it as early as possible? One part of the circumstances is in January, 1795. It is said, that the cause should not have been commenced, if the husband had not evidence enough, and that he ought to go to sentence on the facts alleged in the former part of the case. I apprehend that is not so. If material circumstances come to the knowledge of the party after the commencement of the suit, or happen *pendente lite*, it would be very absurd for the Court, in a cause where the issue is, whether adultery has been committed at some time or other, not whether it has been committed at any particular time, to proceed to sentence without hearing facts stated to have occurred during the pendency of the suit. It is an unreasonable conception.

Again it is said, you may take out a new citation: but would the Court decide a cause when it sees there are facts which might induce a different opinion? I do not recollect the name of a similar case during my own practice, though I think there has been such; but I have a note of Dr. Simpson and Dr. Paul, of *Kell v. Kell* in 1746, to this effect: "In a case of adultery facts allowed to be pleaded, after publication, which not laid in the libel." It is not said whether the facts happened after publication, and therefore this is a stronger case. On that authority, and on general reason, it strikes me that the Court below did perfectly right in suffering the allegation to be given in, and I, therefore, affirm the decree.

The Court pronounced against the appeal, retained the cause, and on the 6th of May, 1796, signed the sentence of separation as prayed by the husband.

DONELLAN v. DONELLAN.—p. 144.

In a suit for separation by reason of the wife's adultery, the conclusion of the cause may be rescinded generally; if the Court is of opinion, after the argument, that adultery is not sufficiently proved.

THIS was a cause of separation brought by the husband against the wife. The libel, after pleading the marriage, alleged; that while the husband was absent in May, and the beginning of June 1794, a person frequently visited and corresponded with the wife: it exhibited an original letter, alleged to be from the wife to the paramour; and another

letter from the paramour to the wife, both fictitiously addressed; it pleaded her elopement, and cohabitation with him.

The evidence of this cohabitation was, that the first witness, a stranger to the wife, saw a woman in bed with the paramour; the second saw the wife in the same lodgings, and heard her called by his name; and the third deposed, "that the paramour confessed to him, she was living in criminal connexion with him."

It was objected by Dr. Arnold, on the part of the wife, that the chief reliance, for proof of adultery, must be placed on what happened after the elopement; that the rule of the canon law required two witnesses before the Court could pronounce a fact fully proved: that though one witness to a fact, supported by circumstances, was sufficient, the rule had not been further relaxed: that being found in bed was sufficient evidence of adultery, but of that there must be legal proof: that identity was perhaps proved, if the fact had been supported by other witnesses, or by other acts; that the confession of the paramour, not in the presence of the wife, was no evidence: that as to the letters, though of the handwriting of the parties, they were not dated; there was no proof of sending; nor in whose possession they were found, nor to whom addressed. The whole cause, therefore, rested on the testimony of one witness, and the law required more. 406. + 34. 307. 533. 2 571. 124.

Per Curiam.

I should wish to give the Counsel for the husband time to consider the proofs in this case; for I think it would be relaxing the rules of evidence too much to pronounce for the divorce on the present proofs. It is strange, that neither the second nor the third witness should depose to any conversation. I shall therefore permit the conclusion to be rescinded generally; for I see enough to incline me to think it is a fair case; but there is not sufficient proof to warrant a sentence.

Conclusion rescinded.

CARGILL v. SPENCE.—p. 146.

In a testamentary cause, the Court—after hearing the arguments and delivering its opinion of the insufficiency of the evidence—may rescind the conclusion, in order that the identity of the alleged testator may be pleaded and proved.

THE Court (Sir William Wynne,) after the argument in this case which respected the validity of a seaman's will, stated its opinion, that though the execution of the will was sufficiently proved, the identity of the testator was not established; and then proceeded:—

It is impossible on this evidence to pronounce for the will, yet if, by practice, the Court can have an opportunity of establishing the fact, by allowing the party to supply the defect, it is bound to do so. It is not for me to inquire, whether the paper be officious, or not, but whether it be the will of the asserted testator, or not.

In the case of Lady Amelia Butler's will, which was executed in the presence of persons not acquainted with her, there was a defect of proof of identity; and the Court rescinded the conclusion in order to allow the link in the chain of proof to be supplied. I shall therefore, rescind the conclusion in this case, and give the parties an opportunity of proving the identity.

There is also a paper which is insisted upon as material; but which is not proved on the interrogatories, though annexed to them. I shall also allow the opposers to plead and prove, if they think fit, that that letter is of the handwriting of Thomas Cargill, the executor: though my only object in rescinding the conclusion is, to obtain proof of the identity.

The following minute was taken down:—"The Judge having heard the proofs read and Counsel on both sides, rescinded the conclusion of the cause for the purpose of permitting John Cargill to plead and prove the identity of the party deceased, and for permitting the adverse party to plead and prove the handwriting of an exhibit annexed to his interrogatories."

On the 4th Session of Easter Term, an allegation, pleading identity, was admitted without opposition; three witnesses were examined upon it; and Cargill having admitted the handwriting of the exhibit, the Court, on the third Session of Trinity Term, pronounced for the will, the identity being fully established.

HENLEY and DUDDERIDGE v. MORRISON.—p. 147.

In a suit for seaman's wages, the Judge may properly rescind the conclusion of the cause for the admission of further evidence.

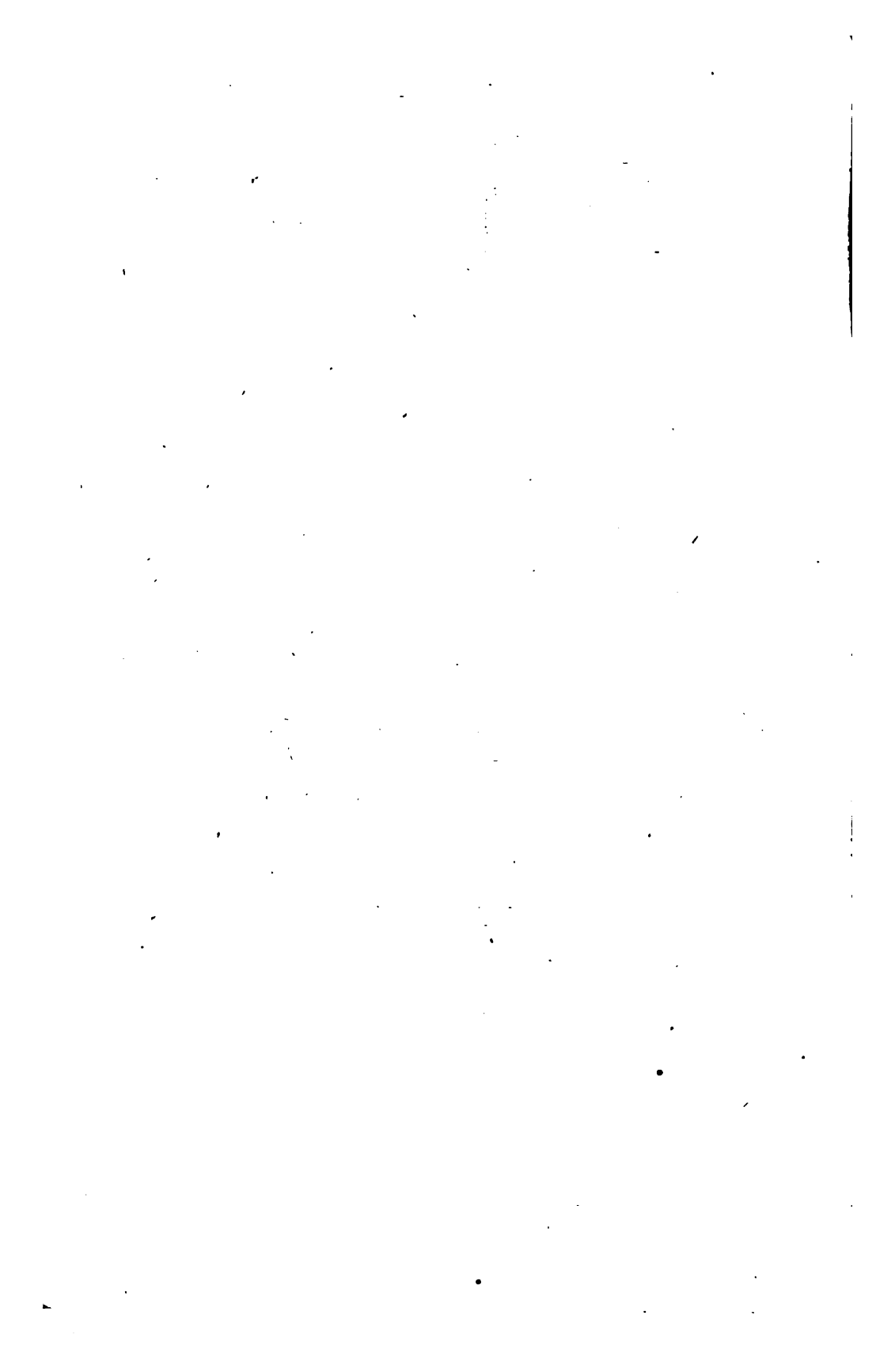
THIS was a suit for seaman's wages, wherein Lord Stowell, as Judge of the High Court of Admiralty, had, after the cause had been opened at the hearing, rescinded the conclusion in order to allow a second witness to be produced in support of the mariner's summary petition: and, on two subsequent occasions, the Judge, on affidavits, also rescinded the conclusion for the same purpose.

From this third rescinding of the cause, an appeal was prosecuted, on the part of the owners, to the High Court of Delegates, wherein the Judges, viz. Mr. Justice Bayley, Mr. Justice Park, Dr. Daubeney, Dr. Phillimore, Dr. Gostling, Dr. Blake, and Dr. Haggard, pronounced against the appeal, and declared "that the Judge of the Court below had proceeded rightly, justly, and lawfully, and they condemned the appellants in costs, and remitted the cause.

REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
CONSISTORY COURT OF LONDON;
CONTAINING THE
JUDGMENTS
OF
THE RIGHT HONOURABLE SIR WILLIAM SCOTT.

By JOHN HAGGARD, LL.D. ADVOCATE.

VOL. I.



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OF
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note 265.

EVANS v. EVANS.—p. 35.

Divorce by reason of cruelty.—What circumstances constitute cruelty in construction of law. Dismissed.

THIS was a case of divorce, by reason of cruelty, instituted by Mrs. Evans against her husband.

JUDGMENT.

SIR WILLIAM SCOTT.

This cause has been carefully instructed (a) with evidence by the practitioners, who have had the conduct of it; and has been very elaborately argued by the counsel on both sides. It now devolves upon me to pronounce the legal result of the evidence, which has been thus collected, and of the arguments raised upon that evidence—a duty heavy in itself, from the quantity and the weight of the matter; and extremely painful, from the nature and tendency of a great part of it, and from the inefficacy of this Court to give relief adequate to the wishes of both parties. Heavy and painful as it is, it is a duty which *must* be discharged; and which can only be discharged with satisfaction under a consciousness, that it is discharged with attention and impartiality, and under the reflection, that if, after the endeavours, which I have used in cleansing and in instructing my own conscience upon the subject, I should have taken what may be deemed an undue impression of the case, the laws of this country have not been deficient in providing a mode, by which the parties may be relieved against the infirmities of my judgment.

352, 3.
352, 3.
5.5.56. The "humanity" of the Court has been loudly and repeatedly invoked. Humanity is the second virtue of courts, but undoubtedly the first is justice. If it were a question of humanity simply, and of humanity which confined its views merely to the happiness of the present parties, it would be a question easily decided upon first impressions. Every body must feel a wish to sever those who wish to live separate from each other, who cannot live together with any degree of harmony, and consequently with any degree of happiness; but my situation does not allow me to indulge the feelings, much less the *first* feelings of an individual. The law has said that married persons shall not be *legally* separated upon the mere disinclination of one or both to cohabit together. The disinclination must be founded upon reasons, which the law approves, and it is my duty to see whether those reasons exist in the present case.

To vindicate the policy of the law is no necessary part of the office of a judge; but if it were, it would not be difficult to show that the law in this respect has acted with its usual wisdom and humanity, with that true wisdom, and that real humanity, that regards the general interests of mankind. For though in particular cases, the repugnance of the law to dissolve the obligations of matrimonial cohabitation, may operate with great severity upon individuals; yet it must be carefully remembered, that the general happiness of the married life is secured by its indissolubility. When people understand that they *must* live together, except for a very few reasons known to the law, they learn to soften by mutual accommodation that yoke which they know they cannot shake

(a) There were several pleadings, and one in exception to witnesses, on which the observations of the Court will be introduced, as a note, in the latter part of this case.

off; they become good husbands, and good wives, from the necessity of remaining husbands and wives; for necessity is a powerful master in teaching the duties which it imposes. If it were once understood, that upon mutual disgust married persons might be legally separated, many couples, who now pass through the world with mutual comfort, with attention to their common offspring and to the moral order of civil society, might have been at this moment living in a state of mutual unkindness—in a state of estrangement from their common offspring—and in a state of the most licentious and unreserved immorality. In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good.

184. 4/3. That the duty of cohabitation is released by the cruelty of one of the parties is admitted, but the question occurs, *What is cruelty?* In the present case it is hardly necessary for me to define it; because the facts here complained of are such, as fall within the most restricted definition of cruelty; they affect not only the comfort, but they affect the health, and even the life of the party. I shall therefore decline the task of laying down a direct definition. This however must be understood, that it is the duty of Courts, and consequently the inclination of Courts, to keep the rule extremely strict. The causes must be grave and weighty, and such as show an absolute impossibility that the duties of the married life can be discharged. In a state of personal danger no duties can be discharged; for the duty of self-preservation must take place before the duties of marriage, which are secondary both in commencement and in obligation; but what falls short of this is with great caution to be admitted. The rule of "*per quod consortium amittitur*" is but an inadequate test; for it still remains to be inquired, what conduct ought to produce that effect? whether the *consortium* is reasonably lost? and whether the party quitting has not too hastily abandoned the *consortium*? 270. 311

184. 4/3. What merely wounds the mental feelings is in few cases to be admitted, where they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty: they are high moral offences in the marriage-state undoubtedly, not innocent surely in any state of life, but still they are not that cruelty against which the law can relieve. Under such misconduct of either of the parties, for it may exist on the one side as well as on the other, the suffering party must bear in some degree the consequences of an injudicious connexion; must subdue by decent resistance or by prudent conciliation; and if this cannot be done, both must suffer in silence. And if it be complained that by this inactivity of the Courts much injustice may be suffered, and much misery produced, the answer is, that Courts of Justice do not pretend to furnish cures for all the miseries of human life. They redress or punish gross violations of duty, but they go no farther; they cannot make men virtuous; and, as the happiness of the world depends upon its virtue, there may be much unhappiness in it which human laws cannot undertake to remove. 270. 311

Still less is its cruelty, where it wounds not the natural feelings, but the acquired feelings arising from particular rank and situation; for the Court has no scale of sensibilities, by which it can gauge the quantum of injury done and felt; and therefore, though the Court will not absolute-

ly exclude considerations of that sort, where they are stated merely as matter of aggravation, yet they cannot constitute cruelty where it would not otherwise have existed: of course, the denial of little indulgences and particular accommodations, which the delicacy of the world is apt to number amongst its necessities, is not cruelty. It may, to be sure, be a harsh thing to refuse the use of a carriage, or the use of a servant; it may in many cases be extremely unhandsome, extremely disgraceful to the character of the husband; but the Ecclesiastical Court does not look to such matters: the great ends of marriage may very well be carried on without them; and if people will quarrel about such matters, and which they certainly may do in many cases with a great deal of acrimony, and sometimes with much reason, they yet must decide such matters as well as they can in their own domestic forum.

264.311. These are the negative descriptions of cruelty; they show only what is not cruelty, and are yet perhaps the safest definitions which can be given under the infinite variety of possible cases that may come before the Court. But if it were at all necessary to lay down an affirmative rule, I take it that the rule cited by Dr. Bever from Clarke, and the other books of practice, is a good general outline of the canon law, the law of this country, upon this subject. "In the older cases of this sort, which I have had an opportunity of looking into, I have observed that the danger of life, limb, or health, is usually inserted as the ground upon which the Court has proceeded to a separation." This doctrine has been repeatedly applied by the Court in the cases that have been cited. The Court has never been driven off this ground. It has been always jealous of the inconvenience of departing from it, and I have heard no one case cited, in which the Court has granted a divorce without proof "given of a reasonable apprehension of bodily hurt." I say an *apprehension*, because assuredly the Court is not to wait till the hurt is actually done; but the apprehension must be *reasonable*: it must not be an apprehension arising merely from an exquisite and diseased sensibility of mind. Petty vexations applied to such a constitution of mind may certainly in time wear out the animal machine, but still they are not cases of legal relief: people must relieve themselves as well as they can by prudent resistance—by calling in the succours of religion and the consolation of friends; but the aid of Courts is not to be resorted to in such cases with any effect.

The parties in this case are a Mr. and Mrs. Evans, proceeding in a cause of cruelty brought by Mrs. Evans against her husband.

"The libel states the marriage at Calcutta, in the East Indies, in the year 1778; and it proceeds to plead the character of the parties; that *he is a person morose, sullen, tyrannical*, and so on; and that *she is in every respect the reverse, a mild and tender disposition*. These pictures are reversed, as is the usual manner, in the responsive allegation. It is usual, in these sorts of causes, to admit articles pleading in this manner the characters of the respective parties; it is usual, I say, to *admit* such articles, but I have not understood that it is usual to examine upon them, or at least to examine upon them in the proportion which has been done in the present cause. And I think, that I feel the weight of some reasons which would induce me very much to question the propriety of *admitting* such articles at all, if they were likely, in other cases, to lead to the consequences they have done in this; for a very great part of this voluminous enquiry has turned, not upon the

matter in issue in the present cause, but upon the general character of the two parties; and I have been loudly called upon, on both sides, to determine *that* which I am not called upon, either by the nature of the authority which I possess, or by the necessity of the present case, to pronounce,—the result of that evidence upon general character.

Upon evidence of this kind it is impossible not to remark, that it is unsatisfactory in the extreme; it is *opinion* at best; the opinion of persons whose powers of judging upon any question of delicacy and importance are utterly unknown to me; whose partialities and prejudices, to colour and influence those opinions, are equally unknown to me. To take such opinions then, and to apply them to the proof of *controverted facts*, and those facts too of a criminal nature, does seem to be extremely unsafe. The case indeed is *civil*, as has been repeatedly observed, 20.338 but the facts undoubtedly are criminal; or else why plead the bad disposition of the husband? why plead it, except for the purpose of showing 5th.253. that he has committed bad acts? Now I know hardly any case, in which it is allowed to create a presumption in favour of the probability of criminal facts having been done, where that presumption is founded upon the mere opinions of men concerning general disposition. Criminal facts must be tried by themselves. To try them by opinions, and by opinions collected in this sort of way, is extremely dangerous for the Court; to the individual, who is exposed to an enquiry of this kind, it is dangerous in the extreme; to place a man in this sort of legal pillory, where all who choose may pelt at him, is exposing an individual to the injustice of mankind, in such a way, as I am sure the justice of Courts cannot relieve him from.

What I have to say upon this part of the case, therefore, will be extremely short, because it is merely a digression for the satisfaction of the parties; it is no foundation, no principle, no part of that legal proof, upon which I shall determine this case. 316.

And I must here take the opportunity of saying, that if the truth of this charge rested upon matter of character alone, it would determine me very favourably in behalf of Mr. Evans. Here are the attestations of a great number of persons—gentlemen extremely respectable in their own characters and situations; connected with him by early and familiar acquaintance; by habits of a long intercourse; by habits of business. But all this, it is said, is the *partiality of friends*. What, is it nothing 34.335 in a man's favour to have friends? Can a man say any thing that bears more strongly in his favour, than that he has friends? partial friends? friends who have become so, and can have become so, from the opinion only of his good deservings? They are persons, many of them, who have lived with him in a distant country, where countrymen collect together in close and intimate connection; *where they form*, as one of the witnesses describes it, *one community*: some of them, two of them in particular, have lived with him in the same family; in the family of Mr. Hastings: they have been connected with him in the conduct of business, where his temper was daily seen and daily tried; for business, as we all know, is very apt to expose the real dispositions of men: it is a tyrannical master; and if a man can go through the difficulties, which even the smoothest course of business will throw in his way, with an unruffled temper, it is no mean argument of a tractable disposition.

All this, it is said, may be very true; but it has happened in other cases, that a man has worn a mask to the public, and pulled it off to his

family. Undoubtedly there may have been such cases; cases of moral prodigies; cases of disgraceful exception to the ordinary course of nature; but the general presumption at least is strong the other way. If a man shows upon all occasions an obliging disposition in his general intercourse with the world, the presumption certainly is, that he carries that disposition with him into the private recesses of his life. If he is a good friend, the probability is, that he is a good husband, which is a friend only of a nearer and dearer nature. It is to be added too, that in this case almost all the witnesses speak to this very specific part of Mr. Evans's character, even the witnesses who are examined on the part of Mrs. Evans. There are particularly Mr. Wood, Dr. Curry, Tomlings, with the exception of one fact, Mr. Paumier, Mr. Griffiths, Mr. Boehm, Mrs. Webber, with the exception of one fact likewise, all these witnesses, who are examined on the part of Mrs. Evans, bear an honourable testimony to his general and visible conduct.

Well, but it is said, there are witnesses who depose in a contrary manner, and you cannot reconcile these two sets of witnesses together, but upon the supposition that what is said by the first set of witnesses is the effect of mere hypocritical assumption. Now the other witnesses, who depose unfavourably, with the exception of Mrs. Hartle, and a young French woman, Madame Bobillier, whom I shall speak of by and by, are Mr. and Mrs. Thackeray, and Mr. Moore. Mrs. Moore has not been examined in this cause, and the reason given for that has been, that she being the 'sister' of the party, might be a witness whom the Court would hear with a great deal of jealousy and suspicion. Most assuredly the same circumstances of jealousy hang upon the characters of every one of these witnesses: they are all persons nearly allied; are subject of course to prejudice: I don't say to a dishonest or dishonourable prejudice, but from that circumstance they are subject to prejudice.

There is another observation that strikes me, and that is this, that all these witnesses, with the single exception of Mr. Moore, found their opinions upon the very facts controverted in the cause. Mr. Thackeray, who has given a very candid testimony in the cause, and on whom I shall very much rely in the determination of it, says expressly, "that till some time after Mr. Evans's return to England he had always a good opinion of him," and he expressly founds his present opinion upon the facts that are now in issue between the parties. Then, only consider what is done in this case. In the first place, the witnesses extract their opinions from these particular facts, and then it is expected that the Court shall take those opinions and apply them to the establishment of the very facts in question. To be sure, if there is such a thing as circularity in argument, this is that; and grosser injustice than that could not be committed. Mr. Moore, indeed, stands upon a very different footing, he goes back to a remoter opinion; his opinion does not arise out of the facts in issue; he refers to a much earlier period of time. Now there are one or two observations, which strike me pretty forcibly upon the testimony of Mr. Moore. Mr. Moore is a man of sense; he knows, I dare say, extremely well, that caution and that sobriety of mind, which belongs to a witness deposing in a Court of Justice to the character of another individual. And I am very sure he does not come here to amuse himself or the Court with drawing highly finished pictures. I am therefore to suppose, as I do, that Mr. Moore is not only perfectly sincere, but that he rather falls short than exaggerates the impression upon

his mind, in the character which he gives of this gentleman; that character is, "that he became intimately acquainted with Mr. Evans, and was a good deal in his company, and saw much of him, prior to his marriage; that after his marriage until the month of April 1780, their families visited; but from the said month until the arrival of Mr. Evans in England, he had little or no intercourse with him; but that upon his said arrival, and for some time afterwards, he the deponent often saw and was a good deal in his company; and has at different periods prior to his marriage, when he was likely to become allied to the deponent's family, and until Mrs. Evans was obliged to quit his house, given a watching and scrutinizing eye over his conduct and disposition, and is thereby enabled to say that he knows him to be a man of wicked, profligate, and abandoned principles, and of a morose, tyrannical, cruel, and savage disposition, void of common humanity, vindictive, full of animosity and revenge, of a turbulent and intolerable temper, avaricious and mean to excess, a great dissembler and hypocrite, filthy in his ideas, and delighting in the dirty expression of them; and so much given to deceit, scandal, and falsehood, that, from a very early period after his aforesaid marriage, it was a rule in the deponent's family never to believe what he said; and that he, the deponent, has often heard him scoff at the religion of the church to which he was brought up or professed; that he has often heard him pride himself on his apathy and callousness, and knows him to be of callous feelings; and that he had the character of a morose, tyrannical, cruel master amongst his native servants in India." And he concludes by pronouncing him, in another passage of his deposition, a person "unfit for admission into society."

Now taking this character into consideration, I think there are circumstances in the conduct of Mr. Moore which are a little extraordinary. This young lady went over to India into the family and under the protection of Mr. Moore; Mr. Moore was acting by her with the substituted authority of a parent; he was perfectly acquainted with the detestable character of this gentleman; it is a courtship which goes on for many months, as is proved by Mr. Moore himself, and yet it does happen that this poor young creature is suffered to fall into the hands of this monster. The marriage is graced by the presence of Mr. Moore, by the presence of some of the most respectable persons then resident in the country, Mr. Vansittart, Mr. Perring, Sir John D'Oyly; an afflicting ceremony it undoubtedly must have been to Mr. Moore; it must, in fact, I am sure, have been considered by him literally as leading her to the altar to be sacrificed. It may be said, indeed, that this was an act of necessity on his part—Be it so: this however might have been expected from a brother's affection and attention, for a brother he certainly has shown himself throughout this business, that he would at least have taken the most early opportunities of acquainting the other parts of his family with this great misfortune which had happened to it. Mr. Thackeray, Mrs. Thackeray, and every member of the family in England, must have been informed by him, if it was only for the security of this poor unhappy young woman, who was so sacrificed, that she was in the hands of one of the most detestable of mankind. Yet nothing is more clear to me than that nothing of this sort ever was communicated, otherwise Mr. Thackeray could not have deposed that he continued "his good opinion of Mr. Evans till after his arrival in England." It is impossible, therefore, that it could have been communicated to Mr. Thackeray, or in short to any one of the family. I think,

therefore, I have, in this case, Mr. Moore's deposition speaking one way, and Mr. Moore's conduct speaking another; and, where they speak different ways, I know which I have to trust to. I have only one way of conceiving the matter, and that is this; his present opinion is sincere, but it is only his present opinion; he has not cautiously watched the rise of it in his mind; he is inaccurate in tracing back its commencement to the period that he does: it is not, as he supposes, the fruit of early and dispassionate observation; it is the fruit of passion, of modern passion, produced by the resentments excited by the later dissensions in this family.

173. Upon the whole, then, I see most honourable attestations to the character of Mr. Evans; and I think I have reason to presume, that if late dissensions had not happened, I should have seen no attestations but such as were perfectly honourable to his character.

On the character of Mrs. Evans I shall say much less; for this reason—because it is much less connected with the issue in the cause; because, if the facts imputed to Mr. Evans are false, there is an end of the question. On the contrary, if they are true, they are of that nature and species, that they cannot be justified by any misconduct on the part of Mrs. Evans; for though misconduct may authorize a husband in restraining a wife of her personal liberty, yet no misconduct of hers could authorize him in occasioning a premature delivery, or refusing her the use of common air. In every view therefore of the matter, Mrs. Evans's character has nothing to do with the cause; and in a cause where so much is to be said upon the necessary parts, I shall waste but few words upon such as are unnecessary and altogether impertinent to the cause. The little that I have to say, is for the satisfaction of the parties; and it is this, that here again, if the matter rested simply upon the evidence given of character, yet after all the unhappy pains which have been taken to blacken each other, I see no reason why these two persons might not have passed through the world comfortably together, with a little discretion and management on their own side, and some discretion and management on the part of those who are mutually connected with them. To be sure, if people come together in marriage with the extravagant expectations that all are to be halcyon days, the husband conceiving that all is to be authority with him, and the wife, that all is to be accommodation to her, every body sees how that must end: but if they come together with the reflection, that, not bringing perfection in themselves, they have no right to expect it on the other side; that having respectively many infirmities of their own to be overlooked, they must overlook the infirmities of each other; then, if friends will be discreet enough to support them in the execution of their duty, there is a high probability that something like happiness might be produced.

174. With respect to Mrs. Evans, there are many attestations much too honourable to be applied to any character that was unamiable, and these too come from witnesses examined for Mr. Evans. What bears a contrary aspect, seems to have come at a later period, when dissensions had arisen, when servants and friends had entered into the factions of the family, had taken sides, and had, of course, a bias hung upon their judgments. But what I principally rest upon, is the testimony of early acquaintance—of acquaintance before hostilities commenced—of Mr. Hannay, Mr. Maxwell, Mr. Halhed, and others. Such persons, I think, must form a safer judgment than Mr. Mason, much of whose judgment,

in all probability, is formed upon the complaints of the husband. I think the attachment of her family, the zealous and animated part which they have taken in her behalf on this occasion, speaks strongly in her favour; and I do assent to the observation that has been made, that if she had been the worthless person she is represented, they would not have stood forward in the manner they have done.

There is one odious imputation in the cause, which I have heard with great pain, and to which I advert with great reluctance, and it is merely for the purpose of saying, that I think it an imputation unfounded and ill-advised; and I can never give way to it upon the evidence that has been given. The appearances of a woman affected by nervous disorders, in a way in which this poor lady, it is in proof, was often affected, are equivocal enough to mislead a stranger, as Mr. Mason appears very much to have been; and as to the servant Fraser, the facts themselves are so trifling to which he speaks, that they amount to little; and when I reflect upon the licence of observation exercised by people of this kind upon the conduct of their masters and mistresses, I must consider it as amounting to nothing. I have then no evidence before me on which it is possible to suppose that the character of this lady is at all polluted by so degrading a habit.

So much, then, for matter of character in this cause; which part of it I now gladly leave, to come to the real subject of the cause,—the conduct of Mr. Evans towards his wife; and, in order to examine that, I must look back a little into their history.

Mr. Evans went to the East Indies, I think, in the year 1770; he was employed in the usual occupation of gentlemen who resort to that country,—in making or improving his fortune. He was in the immediate service of Mr. Hastings, the then governor-general. In 1776, Miss Webb, the daughter of a respectable person in his majesty's military service, went over to Calcutta, upon a visit to two sisters, who were married and resident there;—a Mrs. Moore and a Mrs. Thackeray. It appears, I think, that Mr. Thackeray and his wife were at this time resident with Mr. Moore, but that they left Calcutta before Miss Webb was settled in marriage. In November 1778, the marriage took place, after a courtship of some months, as I have already stated. At the time of the marriage, he made a settlement upon her, to which Sir John D'Oyly was a trustee; and Mr. Boehm, his agent in England, speaks to his belief, that this was a settlement to her sole and separate use. Mrs. Evans appears to have been of a delicate constitution, and the climate of India by no means agreed with her. It is proved by Sir John D'Oyly that she was often in fits in a very early period of their marriage,—that is what he expressly swears. Mr. Maxwell proves, that when she pressed a return to England upon her husband, it was stated that the climate of India did not agree with her. In other respects I see no reason to presume that the marriage was not as productive of mutual happiness as marriages usually are. Sir John D'Oyly swears expressly that she at that time appeared very fond of him; Mr. Griffiths, Mr. Wood, and several other witnesses, who are examined as to the character and conduct of the parties, and who lived in considerable habits of intimacy with them at that time, give me no reason whatever to suspect that any thing like unhappiness then subsisted between them; and all the witnesses, I think, who depose to that period, speak with as little apprehension as to what has since happened as is possible.

In 1781, Mrs. Evans left India on account of her health. Mr. Evans's counsel have taken credit on account of his acquiescence in this separation. Now, this credit is denied, upon the ground that this acquiescence might have been merely for the purpose of getting rid of her. Why, to be sure, if his preceding conduct had been that of a disaffected husband, such a construction might have been fair enough; but if otherwise, it is rather hard to give such an interpretation to the very step which the most affectionate husband must have taken. Credit is taken likewise, by the counsel on behalf of Mr. Evans, that no cruelty is imputed to Mr. Evans at this time. It is answered, that though no cruelty is proved, yet there might have been acts of cruelty, which the prudence of the party, and a just regard to time and expense, have prevented her from now bringing forward. It is within my recollection, and if it had not I have been reminded of it, that in the original allegation given in the cause, she expressly pleaded; that her original return to Europe was occasioned by his cruelty. That assertion I directed to be struck out, because it was pleaded in a way so loose as to be incapable of proof, and therefore showed that the party herself could have had no intention of proving it. It satisfies me, then, of this, that there was no disposition to suppress it, if it had been maintainable; because it is actually noticed in the cause. Taking then the whole together, I am supported by the testimony of all the witnesses, and I think I am also supported by what is full as good evidence, by Mrs. Evans's conduct in this suit, in saying, that no cruelty is at this period of time, her first departure for Europe, imputable to Mr. Evans.

She arrived in England in October 1781. She pursued the means of health,—by medical advice,—by travelling to different parts of Europe,—by proper amusement,—in all of which it is not denied; on the contrary, it is fully admitted, that she enjoyed the most liberal assistance from the fortune of Mrs. Evans. It is proved by his agent, Mr. Boehm, that the expense during her residence in England, amounted to about 5600*l.*, which, by a calculation rather, I think, unfavourable, has been made to amount to near 2000*l.* a year. This certainly is a large sum out of a fortune that was making, that was not yet made;—it was in fact so large as to alarm the friends of Mr. Evans,—and Mr. Boehm took a liberty, which I presume an agent does not often take, of remonstrating on account of the drafts. I think that in the deposition of Mr. Thackeray, notwithstanding he deposes with the guarded and discreet tenderness of a relation, it is yet very easy to see that he hints at something like profusion on the part of Mrs. Evans;—he says expressly, that she was too generous, generous to a fault, and a fault that undoubtedly is, because the province of a woman, in matters of liberality out of her husband's property, is certainly extremely limited. She may be the almoner of her husband, but in the disposal of his fortune she is under very great restrictions. There is one fact particularly mentioned, which is, the lending a large sum of money to a Captain Barnwell; and I own, that if I was to look sharp to find out the commencement of impropriety of conduct, I should be apt to say, that I think I see the first speck of impropriety here attaching upon the conduct of Mrs. Evans, and one sees the folly, the imprudence of such conduct, in the event of this,—for it does appear that this very Mr. Barnwell, to whom this money was lent, was the very first person to complain of her extrava-

gance. It appears that Mr. Evans felt the impropriety of this, but he felt it in a way that an affectionate husband, a considerate man, would feel it;—he said to Mr. Griffith, that she had spent a good deal of money, but that nothing gave him so much uneasiness in her expenses, as the sum of money which she had lent to another person. However, though this produced some dissatisfaction, it produced no rupture,—it was overlooked.

She sailed for Calcutta in December 1784,—she arrived in 1785, and there they remained until 1787. It is a little material to see what passed during this interval. They were visited by a Mr. Wood, a respectable person, who is examined as a witness on the part of Mrs. Evans. Mr. Wood does not give the slightest intimation of any disagreements in this family; on the contrary, he says, that his behaviour, as far as he ever saw it, was studiously and affectionately tender. Mr. Maxwell, a person who was almost domiciled in the house, who dined and supped there very frequently, and was often upon parties with them, speaks likewise of their living upon terms of the greatest harmony imaginable.

Mr. Griffith, who was much in their company, has no insinuation to the contrary in the least. Mr. Hannay, who states himself to have been intimate, never heard the most distant surmise that he treated her improperly. Mr. Halhed, and other witnesses speak to the same effect. —Then, taking the whole of this evidence one way, it is certainly evidence extremely strong; and if to this we add the total absence of all evidence the other way, I think myself warranted to say, that Mr. Evans's behaviour, up to this period, was in every respect unexceptionable.

Two facts, in particular, appear, which it is impossible not to notice;—one is upon the evidence of Mr. Maxwell—and that is of Mr. Evans's going up into the country, at a distance from Calcutta, to Moorshedabad I think, or some other place, on account of her health. It may be said, there is no merit in that, any husband who had a sick wife would do as much; but, it must be allowed, she might have gone by herself: at any rate, therefore, there is great attention shown in this instance of his personal attendance.

The next fact, and a very material fact it is in this cause, is this,—that, purely to gratify her wishes, and to consult her health, he quitted India: a country where he was almost naturalized, and where his prospects of avarice and ambition, at that period of time, were extremely inviting. He was then, as Mr. Maxwell says, a senior merchant. But, say the gentlemen, there is no great merit in that, he had got enough. There is surely some merit in knowing that; it is a merit every body does not acquire; it is a proof of moderation, at least; and that he is not the mean and avaricious person which he has been represented to be: and, supposing he was that mean and avaricious person, still there is the more relative merit towards Mrs. Evans, because if he was a man extremely fond of his money, and yet gave up his money on account of his wife, it is hard to say that he had not some degree of fondness for his wife. Well, but, say the gentlemen, his reputation was concerned. How so? She had already shewn that she could come to Europe without his personal attendance. I shall not then diminish the merit of so good an action, nor suffer it to be diminished, merely because it happens at the same time to be, what every good action is, a reputable one.

I am clear therefore, that up to the time of the voyage nothing mate-

rial had happened to cloud the happiness of this family. The voyage itself; the application made for it by Mrs. Evans; the undertaking of this voyage by Mr. Evans,—are all a security to me that the fact was so; for, if he had been the savage tyrant that he is represented to have been, it is clear to me that she would never have ventured upon such a solicitation with any idea of success, and it is equally clear to me that she would never have succeeded in it. Till this time, therefore, I see in the conduct of Mr. Evans nothing to blame,—I see much to approve.

It is however upon this voyage, "*mala ducit avi domum*," that a change of conduct in Mr. Evans is first suggested to have taken place. It is not very well agreed what this change was, whether it was an indulgence of ungovernable sallies of ill temper, or whether it was a cool systematic plan of distressing his wife, by the most atrocious ill usage: but certainly two things more inconsistent cannot be, than cool hypocrisy and wild passion. Now it is a strong presumption with me against the supposition of its being a case of ungovernable passions, that passions so inordinate appear to have developed themselves for the first time in the course of this voyage. If so, I think there must have been an alteration in the constitution of this man's mind; which is highly incredible. The material witnesses therefore resort to the other supposition. This is the turn given to his conduct by the great witness in this case—Madelmoiselle Bobillier,—namely, that it was a crafty command of his passions; that every thing he did visibly, was studied for ostentation; and that his passions were kept for a secret operation when nobody was by.

One cannot help observing, that taking it to be a cool deep-laid plan, to be pursued and carried into effect in a secret way, the scene for the execution of such a plan is as unhappily chosen as can be. Every body knows, that secrecy on board a ship is a thing not to be thought of. People cooped up in a ship live, and are forced to live, in that state of miserable intimacy, which makes almost every thing that is done or said, known to almost every other person: there is for a time, a very unhappy circumstance it is, almost a suspension of every thing like personal delicacy,—every word and every act is known to almost every body. Now to suppose that a man in such a situation should first think of opening a plan of secret violence, one must first suppose, not only that he left his temper in India, but that he left his common sense with it.

There are three witnesses only who are examined on this part of the case: there is Mr. Curry, a Mr. Humphrey, and a Mrs. Hartle. When the question is asked, Why other witnesses are not examined? the first answer is, That Mr. White is dead;— the second answer is,—That it is not more necessary to call witnesses on the one side than on the other: not to have called more, therefore, is, if any, an equal imputation on both parties. This latter answer might be some answer to the other party; might serve in some degree, to stop their mouths, but it is no answer to the mind of the Court. In the next place, I say it is no satisfactory answer to the other party; because Mrs. Evans is the complainant, and she is the party who is bound to make out her case. But, to go farther, Is Mr. White the only witness who could have been adduced? Were there no other officers but Mr. White on board this ship? They have vouched indeed one female servant, and it is an extraordinary thing that there should not have been more female attendants, a little

black girl, whom they represent as too stupid to be examined as a witness; but I find also two men-servants of Mr. Evans, who are vouched in the case, and who are likewise mentioned both in the libel and in the depositions. They would surely have been most important witnesses, if they had been produced; because they would have spoken a great deal to what has been described respecting the foul clothes, delaying the breakfasts, and the nature of the several orders that were given to them by both the parties in this cause. However, it does happen, that the case is left utterly destitute of all the illustration, which it might have received from their important testimony.

Of the three persons actually examined, to be sure Mr. Curry, so far as situation and character are concerned, is extremely worthy of particular attention. He was a medical gentleman, who attended this lady during the whole of the voyage; whenever she was ill, she was under his immediate care. He swears that he saw her, and saw her in his professional capacity, every day during the whole of the voyage, three days only excepted, during which he himself was confined by indisposition. It has been well said by the counsel for Mr. Evans, that a medical person is a confidential person,—every thing affecting her health must unavoidably have come to his knowledge,—it could not have escaped him. He gives an enumeration of symptoms; he applies a blister, about which Mr. Evans differed in opinion; and I think this gentleman shows a sensibility, more than enough, about the honour of this blister. He has his own resentments against Mr. Evans, and he candidly states them; yet I still think I do see enough in his deposition to satisfy me, that although he would not misrepresent nor exaggerate in the slightest degree, nothing that he knew of Mr. Evans's conduct, to his disadvantage, would be either much softened or at all concealed.

Mr. Humphry was a fellow-passenger, but a witness of no particular intimacy whatever with either of the parties; I think he says, *that he was not in the cabin, in their particular apartment, during the whole of the voyage*. He gives his opinion of Mr. Evans's temper and disposition; he thinks that it was *harsh and austere*. That, however, I am to take merely upon the credit of Mr. Humphry's discernment, for he speaks to no facts whatever, and I must remark, that observations made upon a man's temper, upon the temper of a landsman, during a voyage of six months, ought not to be turned very strongly to his disadvantage; for every-body knows that a voyage of that length is no very great sweetener of any man's disposition, during the time that it lasts.

Mrs. Hartle is a witness who appears to have lived in considerable intimacy with Mrs. Evans, but most clearly she lived upon very indifferent terms with Mr. Evans. She charges him with much personal incivility to herself during the voyage, and it appears that her resentments have since been sharpened by later indignities; so that she is, as Dr. Arnold has well described her, *a sort of co-plaintiff in the cause*.^{323,4} I am to consider her, therefore, as deposing under the double danger of having inducements to take very strong impressions of facts to Mr. Evans's disadvantage, and of feeling no unwillingness to give such impressions their full force in representing them to the Court.

The facts agreed to by these three witnesses are these:—In the first place, that Mr. Evans had procured, at a great expense, the very best accommodations a gentleman of fortune can have in a passage from India. So far all agree. And, in the next place, it is agreed, that she had of

those accommodations, as it was highly proper she should have, the best share. Two of these witnesses, Mr. Humphry and Dr. Curry, are totally ignorant of any quarrels or disagreements during the whole of the voyage. It is said, Mr. Humphry not being particularly intimate, his is merely a negative testimony;—however, for the reason that I have above stated, I think that a negative testimony, in such a case, is a very strong testimony; because it is not possible that any act of atrocious outrage could have happened on board this ship, without its travelling to the knowledge of most persons on board. Dr. Curry's testimony is still stronger; his is not merely a negative testimony; he says, that, *as far as ever he observed, Mr. Evans's conduct was studiously affectionate*. Now, his ignorance seems to me still more irreconcilable with the notion of this ill usage; because, it seems hardly possible that it could have existed without coming to the knowledge of a person who attended this lady constantly upon the occasion of ill health. It is still more irreconcilable with the notion of its being a fact within the possession of any third person; because, though some secret ill usage might have passed between Mr. and Mrs. Evans, which was known only to themselves, and which, from a natural concern for their common reputation and quiet, they might not have divulged, yet it is very unlikely that if there were facts of outrage which got into possession of a third person, that such facts should have rested there, and not have travelled farther.

There is, however, a third person on board this ship, Mrs. Hartle, who undoubtedly differs widely from both these witnesses, and upon her single testimony, the single testimony of an ardent witness, inflamed with resentments of her own, I am to take these facts, contradicted, as they are, by the silence, by the emphatical silence, of the two other witnesses: facts of a nature so atrocious, that they certainly have but little probability to support them, which can be founded on any argument arising from the general disposition of mankind, and which, from what I have stated in this particular instance, had no probability whatever, which is founded in the antecedent conduct of this gentleman.

The first fact which I shall observe upon is that most atrocious fact which is mentioned in the libel, article 6; "That during the passage, Mrs. Evans being in a very low and bad state of health, and fresh air being absolutely necessary for her, Mr. Evans, with a wicked view to distress and increase her sufferings, refused to suffer, and would not suffer, a door to be kept open, or even opened at all, except when he wanted to pass in or out; that at the times he refused the benefit of the air to his said wife, he was not able to stay in the cabin himself during the exclusion of the air, but always retired to his own cabin, or some other part of the ship: and that once, when Mrs. Evans attempted to open the door to admit the air, she was prevented by Mr. Evans, who, with savage fierceness, seized her by both her arms, and, in great rage, with his utmost force and violence, threw her down three times, alternately raising her for that purpose, upon some earthen gugslets, or vessels used for cooling water, and thereby very much hurt and bruised her, put her to great pain and anguish, and increased her illness."

The account given by Mrs. Hartle of this transaction, shows that even this account given in the libel is not at all overcharged. What she says is, "That one morning, in their passage to St. Helena, the deponent and Mrs. Evans were in Mrs. Evans's room, walking towards Mr.

Evans's room; that they observed him sitting there; that seeing them approach, he got up, and immediately went to and shut the door of the cuddy; that they were then under the Line, and there was not a breath of air stirring, and the deponent was extremely faint." So that in fact the cruelty stated seems to be a cruelty that rather attached upon the witness than the party, and so indeed Mrs. Evans represents it; for her application, according to Mrs. Hartle's testimony, is this: "Do, Mr. Evans, let us have the door open,—Mrs. Hartle is ready to faint." She then goes on to say, that "Mrs. Evans then went towards and proceeded to open the door; that Mr. Evans, who was sitting with his legs up in an easy kind of posture, and was reading, then got up, and with a savage fierceness laid hold of both her arms, and then with violence threw her down, and she fell upon some earthen gurglets for holding water, which stood close by the said door; and lifting her up again by her arms, with equal violence threw her down on the said earthen gurglets; and she the deponent thought that by means thereof she was almost killed; and being greatly terrified thereat, went out to send the black girl to her assistance; that on going out she heard a noise, as if Mrs. Evans was falling a third time; that she returned into the cabin, and found her sitting in a chair, her whole frame appearing convulsed, and her face quite pale; that the deponent observed grasps of fingers on her arms, which appeared black and blue, and that the deponent had not before observed such appearances on her said arms, and they appeared in parts of which Mr. Evans took hold, and, as she is well convinced, were occasioned by him; that the said Mr. Evans, on his so throwing the said Mrs. Evans down, appeared in a very great rage, and he extended his mouth, and clenched his teeth in a revengeful manner, and his countenance quite changed with anger; and that the said Mrs. Evans appeared very ill and low for many days afterwards."

This, indeed, is such an act, that one can hardly find an epithet to give it its due character. It is, as has been said, a demi-murder, a murder more than half executed. It is an act not to be excused upon any sally of passion; that a man, on so slight a provocation as this, should three times knock his wife down, a woman of very tender health, in the way that is here described, is an act that does go to the very full extent of what the law must deem to be matrimonial cruelty. It is a fact of that atrociousness, that a Court of criminal jurisdiction would pursue with the greatest vengeance, and I need not add, that the common indignation of mankind would follow it to the latest period of the life of the offender.

Mrs. Hartle I cannot upon any idea suppose to be a person who comes deliberately to misrepresent, nothing looks like that. She is totally unimpeached as to general character; therefore, *a priori*, there is no reason why she is not to be fully credited. However, it is a good safe rule in weighing evidence of a fact, which you cannot compare with any other evidence to the same fact, to compare it with the actual conduct of the persons who describe it. If their conduct is clearly such as upon their own showing it could not have been, taking the fact in the way they have represented it, it is a pretty fair inference that the fact did not so happen. If their actings, at the very time that the fact happened, represent it one way, and their relation of it, at a great distance of time, represents it another way, there can be no doubt which is the authentic narrative, which is the naked truth of the matter. Now, in

trying Mrs. Hartle's narrative by that test, I think I do see enough to satisfy me that she has deposed, I do not mean to say without principle, but she has deposed with passion; and that this is a very grossly inflamed representation, produced by repeated resentments, conceived partly on her own account, and partly on that of Mrs. Evans.

What is the conduct that any person of common sense and of common humanity would have adopted, who had been present at such a scene of infamous brutality as this is? Why, a man, be his powers of body ever so weak, that had the common spirit and feelings of a man, would have interfered, without the least apprehension of personal consequences to himself: but here there is a lady present, a friend of the suffering party: Is it credible, that she should be present at such a transaction as this, without raising a general alarm?—Not to do so, for the purpose of obtaining assistance, is an act of brutality almost as brutal as the act itself: it is really being an accessary after the fact. Why, without reasoning upon it, mere instinct would have compelled her to do so. Now, what does she do? Does she apply to Mr. White? Does she apply to any officer? Does she apply to the surgeon? Does she apply to any one person who could have interfered with effect? There is not a man on board the ship, undoubtedly, who would not have lent a willing hand. Mr. Evans would have had good luck if he had not been voted into the sea, by general consent, upon such an occasion as this. Instead of this, what does she do? Why, she runs out, and sends in the little black girl, who, they tell me, at this moment is too stupid to be examined as a witness; she sends her in to rescue this poor lady from the hands of this tyrant, and thus discharges the office, it seems, of a good friend, of a good christian, and of a human being.

What is done afterwards? Her friend is extremely weakly;—is attended constantly by a medical person,—and, as she swears, *is made ill for many days in consequence of this treatment*; yet this lady does not communicate one syllable of the matter to the physician, who was so much concerned to know it, and whom she saw every day: he is in total ignorance of all that has passed.

17.338, The counsel on the part of Mrs. Evans have very properly reproached Mr. Evans with cruelty, for not having communicated to Mr. Paumier the unhappy habit of intoxication with which he has charged his wife. They say, it was his duty to have done it, as undoubtedly it was. Then, what am I to think of the conduct of Mrs. Hartle upon this occasion? She was a person who was certainly under no restraint from any partiality to the defendant; directly the reverse. It is a behaviour, in my apprehension, so totally unnatural under such circumstances, that I am satisfied such circumstances could not have existed. But what does she do when she comes to England! What would any body have done in such a case, with common reflection? Why, clearly, have advertised the family, not maliciously, but confidentially; would have put them upon their guard; would have told them, that, with all the speciousness of manners which this gentleman assumed, she had been witness to a scene of horror, which showed him to be a most intolerable tyrant. Not a word of all this passes. She visits regularly, upon the invitation of this very gentleman, as if nothing extraordinary had happened, and the family remained perfectly uninformed. I rely for these facts upon the testimony of Mr. Thackeray; for, how is the continuance of this gentleman's good opinion any way consistent with

his knowledge of this fact? or, how is his ignorance of the fact consistent with the knowledge of it by any one of the family? I have all the reason in the world, therefore, to believe that the disclosure of this fact took place very recently before the commencement of this suit.

Let us now see the conduct of Mrs. Evans under all the pain, and all the terror, which such a situation must excite. No alarm is given by herself; yet in the account given by her of attacks made at other times, she pleads and proves that her piercing cries brought people from all parts of the house. Mere animal nature would have made its appeal to the ordinary feelings of other people: she must have done it, nobody could submit to be murdered in this sort of way, in silence. Yet I hear nothing of any cry of distress; it does not appear that a single person was collected by any expression of pain or suffering. She is equally silent before her coming to England: not a word to the physician in attendance; not a word upon her coming home to her own family. It is said, that all this was tender dissimulation for the character of her husband. That seems to me to be very hard to be conceived. I have been put in mind of Lady Strathmore's case, where a continued series of ill usage, for years together, was kept from the knowledge of every body, but three or four people: but then I must take along with me this fact, that the gentleman charged had taken every precaution to preclude a possibility of detection; for he had planted his own creatures about her: and the very first opportunity that she had of disclosing her real situation, the business blew up immediately. There was, I remember, in this Court, the case of Mrs. Prescott: that was a case, to be sure, of a person who had suffered as atrocious ill-treatment as one human being can receive from another, and she bore it with great, with wonderful resignation. But this was proved in that case, that she did not keep it entirely unknown to others; she implored the protection of her father, whenever she was ill-treated; she communicated it to medical persons; not a word of harshness in the style of her complaint; her complaint to the Court was conceived in strong language, but it was in language more expressive of sorrow than of anger: *Shah* but still there was no dissimulation. Now, I do not conceive that Mrs. Evans would have been less prompt to complain than Mrs. Prescott was. I have looked into the libel in the present case, which certainly does appear to me to be drawn with sufficient acrimony; I have looked into the personal answers, and I cannot help saying, that these personal answers are written with full as much passion as prudence: I do not see in these answers the marks of that perfect resignation which is so much contended for. I do not mean to say, Mrs. Evans appears in her conduct in this suit, or in any paper produced, to be a person who would assert her rights improperly; but I do say this, that she appears to me to be a person who would not dissemble her injuries in a way beyond all example, beyond all propriety, and all reason.

Then, taking the fact upon this view of it, I feel no hesitation in saying, that what I collect is this:—That there was something of a struggle, how arising I don't know, but it was a struggle of no consequences; and that is the important point. If it had drawn consequences after it, there must have been other witnesses, and the witness who was there would have acted otherwise. It must have been therefore a trifle, and in being coloured as a matter of importance it has received an undue colour; the

basis of the fact is extremely slight, and all beyond it is colour—is exaggeration—is passion.

Having disposed of this great leading fact in the voyage, I shall dispatch in fewer words the other facts which are charged; in the first place, because they are, compared with this fact, very slight; in the next place, because they stand upon the single testimony of Mrs. Hartle, who, in my opinion, has taken a very undue and extravagant impression of the whole business.

There is another charge, which is so strong a proof of this, that I shall notice it for no other purpose, than to exemplify the strong bias of this witness to make mountains of mole-hills. I mean her evidence upon that article which charges the business of the noises. It is pleaded, “that while Mrs. Evans was in a very weak and sickly state, Mr. Evans accustomed himself, in the most unfeeling and cruel manner, to distress her and increase her pain, by making a violent noise with a hammer close to her.”

I had very great doubts about admitting this article. I admitted it upon an idea suggested naturally enough by the words, that this gentleman came, without any reason whatever, with a heavy massy instrument, to make a loud noise quite close to the head of a very sickly and infirm person. These are the ideas which that article, worded as it is, certainly excited in my mind. I do not believe that it could have entered into the conception of the most ingenious person in this Court, to have imagined how this would have ended—to have imagined that it should end in this gentleman’s cracking almonds in an adjoining room with a hammer, which, being proper for such a purpose, could be no very ponderous instrument, and his afterwards coming to eat them in his wife’s apartment. I do protest it is so singular a conceit, that if I did not see a great deal of unhappy seriousness in other parts of this cause, I might rather suspect that some levity was here intended against the Court. I am sure of this, that if a man wanted to burlesque the Ecclesiastical Courts, he could not do it more effectually, than by representing that such a Court had seriously entertained a complaint against a husband, founded upon the fact of his having munched almonds in the apartment of his wife.

Another offence charged is, that he obstructed the circulation of air. Certainly, that may be cruelty, because health may be affected by it: life may be destroyed by it. Here, again, I look in vain for the testimony of the physician. It is pleaded expressly, that her complaints were much increased by it. In the libel it stands thus: That Mr. Evans, with a wicked view to distress and increase her sufferings, refused to suffer, and would not suffer, the door to be kept open, or even opened at all, except when he went in or out. Now, any body would suppose that this door was kept obstinately shut during the whole voyage, except when he went in and out; and that this poor lady was shut up in an apartment from which the common element was excluded. How does it turn out? Mrs. Hartle, herself an invalid, chooses to reside almost constantly in this apartment. Her account is, that he often shut to the door, sometimes the cuddy-door, which I take to be the external door, in consequence of which he would suffer the inconvenience in common with themselves; that at other times he would shut the inner door, between his apartment and theirs; and this, she says, he did without apparent cause, that is, without a cause apparent to her. Now, am I therefore to presume,

that because there was no cause apparent to her, that there therefore was no real cause? Am I to call upon a gentleman, at the distance of two or three years, to show a reason why he shut a door; merely because another person chooses to think, and it is conjecture and inference only, that he did this for the purpose of plaguing his wife? Were there no calls of private convenience? Were there no calls of private decency, but Mrs. Hartle was to be previously informed of them? Were there to be no moments of privacy from his own wife, much more were there to be none from the wife of another gentleman? It is said, that in the fact particularly alluded to, he was reading at the time. Why, is a man to be bound down so strictly to time, that he must put on his clean shirt at the very moment of his shutting the door? that he is not to be permitted to take up a book, even for a few minutes? It is said, by way of aggravation of the cruelty, that he himself did and could walk out upon the deck. Why could not the ladies do the same? If he did shut the door, they could have opened it with as slight an effort as he shut it. Is it pretended that he locked the door? It has not been contended that he did; but if he had locked it, they had still another retreat, for, as I understand the evidence, their cabin had a door opening to a gallery, communicating with the open air. But supposing some inconvenience was actually produced, yet, in order to make it cruelty, I must affect him with a knowledge that it would have that effect, and in a painful degree; for unless they prove that he was perfectly sensible of that, namely, what the number of necessary inlets for air was, there is nothing like cruelty in the case. How is he to know more than Dr. Curry, who is convicted of a gross mistake respecting this subject? He describes the number of doors and windows, and amongst the rest, the door which led into the apartment of Captain White and the officers; and then goes on to say, that if any one of these doors or windows leading into this (Mrs. Evans's) apartment were shut, the circulation of the air would be obstructed in a very high degree. Now, the fact proved to me by Mrs. Hartle, in this case, is, that the door which led into the apartment of Captain White was kept shut during the whole of the voyage, except only three days; and that it was so kept shut at the particular request, and for the particular convenience of Mrs. Evans. What reason have I to say, then, that Mr. Evans knew the consequences of opening or shutting one inlet of air, when I find a medical person, perfectly well acquainted with the apartment, lying under so total an ignorance with respect to the very same particular.

The article of foul clothes was another article which was admitted merely upon the ground of its being associated with other articles of more weight: because, where there are articles of great strength in their own nature, the Court is always less delicate about admitting slighter articles, which it would not have admitted singly and standing by themselves. To be sure, it might be a cruelty, if, as described in the libel, he brought large collections of loathsome clothes, in a very hot climate, into the apartment of a person extremely sick, without any necessity for it, or without any signal convenience. Either this necessity or some signal convenience, would justify it; and it must be shown that there was neither; for certainly I shall not presume it so, in order to make it out to be cruelty. Now, what is proved in this case? These foul clothes hung at first in the quarter-gallery. Upon a suspicion entertained by Mr. Evans, whether right or wrong is utterly immaterial, that these

clothes were pilfered by Mrs. Hartle's black servant, they were removed into his own room, where they generally remained; sometimes, as Mrs. Hartle says, for near a month. He therefore had the general inconvenience of them; and it certainly is to me a pretty strong presumption, that he did not conceive these bags to be bags of poison, when he made his own room their ordinary station.—Mrs. Hartle says, that they were from thence occasionally brought into Mrs. Evans's room, which being a larger room, they undoubtedly could not be more offensive than they had been in his smaller room. She says, she has seen him bring them in, and his man Oliver assist in sorting them. In order to be sorted they must be spread, and accordingly they were spread. Now, what hindered the ladies from retiring during this operation? And it has, besides, been justly observed by the counsel, that in such situations as these a great deal of accommodation must be practised. Every body who has been in such a situation knows, that he must submit to a great deal that is very loathsome; and he must perform a great deal that is very servile. But, however, she says, they were removed before dinner: and supposing that the smell did not entirely remove with them, who had the most of it? Undoubtedly this gentleman had not been upon a bed of roses all the time, according to their own account of the matter. But all this could not be for convenience, she says. Why? Because he used to spread them, under a pretence of sorting them. Why, has not she herself proved in her deposition that he actually did sort them, and that she had seen both him and his man Oliver employed in that operation.

Another cruelty is that respecting the denial of breakfast, which is charged in the seventh article of the libel; and it is charged thus:—That she used to give orders to one of Mr. Evans's servants to boil her tea-kettle, that she might get her breakfast early, as necessary for her health, not only on account of a blister on her side, and a burning thirst that then afflicted her, but also by reason of her being then pregnant; at which times Mr. Evans positively refused to suffer, and would not suffer, his said servant to boil her tea-kettle, and thereby deprived her of the means of satisfying the cravings of nature, and obliged her to resort to drugs for relief.

Now the proof of this last consequence, of her resorting to drugs for relief, is this, that one morning Mrs. Hartle saw her take some pills; but that those pills were specifics against the want of a breakfast, or had any connection with the want of a breakfast, there is not the least suggestion. In this case, the men-servants to be sure would have been the satisfactory witnesses; because they could have spoken to the orders that were delivered on both sides—to the orders given by Mrs. Evans, —and to the orders given by Mr. Evans. But all that I can find upon this article is, that Mrs. Hartle positively swears, she knows of no general orders given to the servants not to boil the kettle. I find also from her, that Mr. Evans did send, upon several occasions, about eight o'clock, to her for tea. I find, on the contrary, from Mr. Humphry, that he generally saw, every morning at eight o'clock, the servant going with the tea-kettle: and therefore it is no unreasonable presumption, that an omission of any one morning of a punctual attendance at that hour, might be the effect of some accident, or of some particular inconvenience.

It is true, indeed, as I find from Mrs. Hartle, that she one morning

heard Mrs. Evans desire Mr. Evans, whilst dressing, to let one of his men servants come to get the breakfast, and he replied he should not come: but I do not find from Mrs. Hartle, that this application was made under a representation of some particular urgency or distress. It amounts to no more than this; that the servants were at that time engaged about his person; that she desired one of them might come immediately, and he refused. This might be uncivil, or it might not: that depends upon the manner of the refusal, upon the delay interposed, and upon the occasion that was at this time occupying the attention of the servants. But I shall not hold this to be decided cruelty, till I am first satisfied of this position—that if a husband is employing his servants about his own person, he is, upon the very first summons, to detach them on the commands of his wife; and that if he declines this, the very instant that it is required, it is not only an incivility, but that gross inhumanity for which the law will grant relief.

There is one charge of a graver complexion, and that stands in the tenth article:—That one evening, whilst the ship was in her passage, and whilst Mrs. Evans continued in a very weak and sickly state of body, pregnant, and scarce able to move, and being desirous to go to bed, she called to Mr. Evans, who was in an adjoining cabin with two of his men-servants, desiring he would send one of them to unlash her cot, that she might go to bed; but that he positively forbade his said men from following her directions, and she thereupon called a little black girl to assist her; upon which Mr. Evans ran into Mrs. Evans's cabin, and in great rage and anger pushed the said little girl away, and, with great fury and force, gave Mrs. Evans so violent a blow or push as drove her to the further or other end of the said cabin, and laid her prostrate on the floor, where she remained a considerable time without being able to rise, and thereby greatly hurt and bruised her, and put her in great peril of her life; and that Mr. Evans, without regarding the helpless situation to which he had reduced her, with the greatest indifference retired to his own cot in the next cabin, and from thence uttered the most shocking and abusive oaths and imprecations against his said wife.

There are three witnesses who are vouched in this very article, who certainly could have proved a very considerable part of it; they are, the two men-servants, and the black girl. It stands however a naked charge, without evidence, or even an attempt at evidence;—a charge in itself almost of direct murder, and subject to all the observations which I have made, upon the impossibility of such a fact as this escaping notice; and yet not a single witness is produced to it! Surely it is not a sufficient apology in such a case to say, that it is a misfortune that it could not be proved; because it is a misfortune which must have been perfectly known, I apprehend, to the party, at the time when she inserted this article. And I must say, that to blacken the records of the Court with an accusation of so very grave a nature, without calling one witness to support it, is taking something of a liberty with the Court, and is taking a pretty gross one indeed with the person who is the subject of such an accusation.

Upon the whole history of the voyage, and the facts contained in it, I find myself compelled to say, that I have no evidence which satisfies me, that Mr. Evans has acted in this voyage in a manner inconsistent with the duties, and the rights, of a husband. If he had so done, it is im-

possible but that there must have been ample evidence; on the contrary, a great part of the evidence is absolutely irreconcilable with the notion of such misconduct having been practised. The evidence that does support it comes from the mouth of a person, who is in a great degree disabled by her prejudices.—But let me not be understood to insinuate, that this witness comes forward to deliver a false testimony. I am firmly persuaded that she believes every word she says; but she trusts to her resentments rather than to her recollections; she brings with her sincere intentions, but she does not bring a dispassionate mind; she does not bring that caution, and that sobriety of mind, which belong to a witness, deposing in a Court of Justice, upon matters by which the character of another individual may be so deeply affected.

294. The voyage ended in the middle of September, she being then, I think, as was observed by Dr. Laurence, not above three months pregnant; and about six weeks of this time had been spent upon the voyage from the Western Isles to the chops of the Channel; so that the pregnancy is clearly proved, I think, to have been in such a state of mere incipency, during some of the facts spoken to, that it cannot be understood to make any material ingredient in the cruelty.

Upon their arrival they were received, as far as appears, with affection, and with politeness, by their friends on both sides. Nothing transpires of all these horrible businesses, which happened on board this ship. Mr. Evans is proved by Mr. Thackeray to have then possessed his good opinion, and that of other persons of his family.

What is Mr. Evans's behaviour upon his arrival? In three or four days he invites Mrs. Hartle, a person not very acceptable to himself, but the friend of his wife; he likewise desires Mr. Paumier to give her all necessary attention, to give her every possible attention during her illness. He soon after goes over to France with her, where he engages in his service a Mademoiselle Bobillier, a young French woman, at the express request of his wife: they return, and they settle in Bond Street. Mr. Thackeray, to whom I very much adhere during the whole of this business, says, That Mr. Evans's general conduct and behaviour to Mrs. Evans was very attentive; and that he saw nothing improper therein, till near the time of her lying-in: he admits too that Mr. Evans supplied her liberally with money till almost the time of the unhappy separation.

The evidence of this Bobillier is, that she herself never was a witness to any quarrel between them; but, that, she says, was mere craft on his part; for she infers, from tears which she has found Mrs. Evans in, and the Counsel have laid much stress upon these tears, that there must have been secret ill-treatment. I own, that tears, in the case of a very nervous person, do not seem to me to lay the foundation of any very conclusive evidence one way or the other.

In January, going to a ball at Mr. Hastings's, she had, somewhere or other, I think it is not clearly proved where, the accident of a fall. It is spoken to by a great number of witnesses on both sides. This fall was not the occasion of much immediate injury, as far as appears: this appears however from many of the witnesses, that, upon that occasion, Mr. Evans acted with a very laudable tenderness. He carried her up stairs in his arms. He applied to Mr. Paumier to recommend a doctor, having his apprehensions of the consequences which it might occasion: Doctor Denman was the person who came. And it appears that she actually did miscarry within three or four days after this fall. To be sure, the argument of "*post hoc, ergo propter hoc*," that because the mis-

carriage immediately followed, therefore it was occasioned by that which it followed, is not a very conclusive one; for it is no very easy matter to trace a misfortune of this sort to a precise cause, and with such exactness as to say that, either in the whole or in part, it was owing to the fall, and to nothing else.—But, however, this at least is clear, that to her nurse, Mrs. Tate, a confidential person most certainly, Mrs. Evans did herself ascribe her miscarriage to that accident. It certainly is not improbable, though no immediate injury had happened; because, as it is generally understood, fright, alarm, and agitation of spirits, frequently do precipitate such matters; and what makes it more probable in this instance is, that it is in proof that this lady was in the habit of miscarrying, for it is proved she had had two miscarriages before her return to Europe.

Yet, in her libel, Mrs. Evans herself has ascribed the miscarriage to a very different cause; for it is pleaded, that *it was occasioned wholly by the pain, anxiety, and terror that she was continually in, from the cruel treatment of Mr. Evans.* I have above stated what Mr. Evans's visible conduct was, from Mrs. Evans's own witnesses; from her own family; from persons of honour and of caution, and who certainly would not have dissembled it, had it been otherwise.—What was not visible must be merely conjectural, and, in my apprehension, very perversely so, if it is to be represented as opposite to that which was visible. To what this miscarriage was imputable I do not pretend to say; but I do say, that it was not owing to the cruel conduct of Mr. Evans; because, if it had, it is most perfectly clear, that such conduct must have been proved. Now, to whom is it known, that Mr. Evans was the author of that miscarriage? Why, to one witness only. To Mademoiselle Bobillier, a young woman of the age of twenty-five, who does take upon herself positively to swear,—that *this premature delivery—I use her own words—was entirely occasioned by the unkind behaviour of Mr. Evans to his wife, and for want of proper attention to her during her pregnancy.*

As this witness makes a pretty conspicuous figure in this cause, it is necessary to consider a little who she is. Her deposition, upon the face of it, is highly coloured and inflamed, very descriptive, full of image and epithet, something in the style really of a French novel, of the trash of a circulating library. At the time of her giving in her deposition, it is also in proof that she had a pretty acrimonious suit with Mr. Evans. She is a young woman, who having been first known to Mrs. Evans upon her former excursion into France, was, on this second excursion, taken into the family as a governess, and was brought to England in November; she therefore was in the service only two months of the pregnancy, and she most positively declares, his visible behaviour to Mrs. Evans was perfectly proper during the whole of the time.

She appears to have been on terms of great intimacy and confidence with Mrs. Evans. I need not observe upon the abuse that is too frequently made of that sort of situation.—Female friendships are often hazardous, in the case of married women, but, of all friendships, humble friendships are the most dangerous. The humble friend has an obvious interest in falling in with the present humour,—in creating and in inflaming differences between the husband and the wife,—in acquiring importance to herself by being a sort of third estate in the family. I own I cannot but think that it has been a very great misfortune to

this family, that this person ever became a member of it; for in this I am clear, that if she aggravated matters, in her reports to Mrs. Evans, only half of what she has done in her reports to me, she has employed an activity that has been most fatally successful in troubling the repose of this family.

To be sure it is a monstrous proof of an intention to exaggerate, beyond all decency of appearance, that this witness, who had been little more than two months in the family, takes upon herself positively to say, *that this miscarriage was owing to her being kept, during the whole period of her pregnancy, in a state of persecution.* Taking this assertion in the most qualified way, it is a very unwarrantable assertion, undoubtedly, for the witness to throw out. What possible confidence can I then have, that any thing she says is true, when I find her swearing at random to what it is impossible she could know, whether it be true or not? The fact is, she is not supported by any one witness in the case; there is not another witness examined, on the part of Mrs. Evans, who refers the miscarriage to the same cause. Mrs. Thackeray makes no reference of it to that cause; Mrs. Evans herself makes no reference of it to that cause; she refers it, in her conversation with Mrs. Tate, to another cause entirely: to Dr. Denman, and to Mr. Paumier, she does not pretend to insinuate that it is the effect of any such ill-treatment. And as to his want of attention to her, which is stated by this witness, it is most positively contradicted by the person who must know it best; that is, by the very apothecary who attended her, and who speaks, in the strongest and most unreserved terms, to the care and attention shown to her by Mr. Evans.

The libel pleads, in the eleventh article, to this effect:—"That after the arrival of Mr. Evans and his wife in England, and whilst they resided in Bond Street, she was delivered of a seven month's child; which premature birth was wholly occasioned by the pain, anxiety, and terror she was continually in, from the cruel treatment of Mr. Evans; and that whilst she was in labour, he barbarously refused to call any assistance to her: and when, at last, assistance was had, he obliged her attendants to leave her, when he bolted the door upon her, and detained her from them for more than an hour, notwithstanding the pains of labour were then severely upon her, and her life was in imminent danger, for want of assistance: and that after her delivery, she was for six weeks, or thereabouts, confined to her room, in a very low, weak, and languishing condition, and her life was despaired of; notwithstanding which, Mr. Evans greatly disturbed, harrassed, and tormented her, by frequently making great noises, and by knocking and thumping in her bed-chamber, and thereby preventing her from taking any rest; and also by suffering and allowing his men-servants to make great uproars and disturbances, when intoxicated, over her head; all which endangered her life."

Now here we are agreed:—the counsel on both sides concur in the atrocity of this conduct;—because, if it be true, that he treated his wife in this brutal manner, in an hour when every animal and every moral feeling called for his tenderness, he is one of the most disgraceful exceptions to human nature that one has ever heard of; a more enormous conduct cannot be figured by the imagination; thus to attempt the life of his wife, and the life of his own infant, is a cruelty that "out-herods *Herod.*" It is impossible that the friends of any woman should suffer him

to live one minute afterwards with her, if they were not destitute of common sense, as well as common humanity.

Bobillier is the principal witness upon this article. I had almost said the only witness; and I am satisfied that the account which she gives is utterly discredited, even by herself, as well as by the other witnesses who are vouched for this article.

The account that she gives is this:—That “in the month of January 1788, she was delivered of a seven months child; which premature birth was entirely occasioned by the unkind behaviour of Mr. Evans towards his wife, and for want of proper attention being paid to her by him during her pregnancy; she having been constantly kept, during the whole period of her pregnancy, in a state of agitation of mind, by the teasing contradictory behaviour of her said husband, who never suffered her to have a minute’s peace, and who always took occasion to quarrel with her from the most trifling occurrences. That, about two o’clock in the morning of the day on which Mrs. Evans was so brought to bed, Mr. Evans came into the deponent’s bed-chamber, and, having awoke her, he told her that Mrs. Evans wished to speak with her.” This is the proof that this gentleman barbarously refused to call assistance, when he was the very first person that got up and went into the apartment of this confidante, and for this express purpose. “She went into her apartment,” she says, “and then gave her such linen as was necessary for her situation.” What she means by that expression is not very clearly to be understood, because it is most clear from what follows, that she had not any idea that at that time Mrs. Evans was going to miscarry; for she goes on to say, that “neither the deponent, nor Mrs. Evans, as she verily believes, had then any idea, that she was going to miscarry; the pains she suffered, and the symptoms attending them, being entirely different to what the deponent understood had been the case on her first lying-in: that Mrs. Evans then informed the deponent of her having made Mr. Evans acquainted with what she felt, and the deponent verily believes that he well knew that his said wife was then in the pains of labour and going to miscarry.”—That is to say, these two women, this woman of the age of twenty-five; the other lady, who had had children, and who had twice miscarried before, have no suspicion of what is going to happen; but, for the purpose of making out an act of cruelty, he is to be affected with the knowledge of this circumstance, with the knowledge of a fact, of which these two women, as she declares, were themselves utterly in ignorance.

She goes on to say, that “he desired the deponent to return to her apartment, and said that he would give her notice if she became worse; that Mrs. Evans then told the deponent, that she wished her to stay by her; but Mr. Evans having expressed his intention to abide by her himself, Mrs. Evans did not dare to insist on the deponent’s continuance with her, for fear of the resentment of Mr. Evans.”

That her continuance was pressed is not all stated. Mrs. Evans desired she might stay; her husband said he would stay, in order to give notice if the intervention of any other person was necessary. This desire, from what appears, was immediately given up, and this woman accordingly returned to her own bed-chamber. “About seven o’clock on the following morning,” she says, “she went into the bed-chamber of Mrs. Thackeray, the sister of Mrs. Evans, who was then on a visit to her, whom she acquainted with what had happened in the course of the

night." I think she would have acted at least with as much prudence, if she had done this at the very moment when she had been summoned by Mr. Evans. She however acquainted her then with what had passed, and Mrs. Thackeray instantly said, "she was sure her sister was going to miscarry, and she immediately got up. Mrs. Thackeray then sent for Mrs. Webb, the mother of Mrs. Evans, and Dr. Denman; they both came about half after ten o'clock in the morning, at which time," Bobillier goes on to say, "Mr. Evans was still in the bed-chamber with Mrs. Evans, and had not himself given any directions whatever in regard to her, although fully aware of her dangerous situation;" in short, that he remained so many hours perfectly cognizant of the situation of his wife, without giving any directions with regard to her.—Now let us enquire what Tomlins says on this part of the cause. But I must first take notice, that Tomlins is the waiting maid of Mrs. Evans, and a witness who is examined on her side; yet she is a witness whom they have not thought fit at all to examine, to this matter of the lying-in. All that she deposes on the subject comes out upon the interrogatories put by Mr. Evans. In the next place I must take notice, that there is another person, and that is the nurse, who must have also been cognizant, and in a very informed degree, of every thing that had passed; and it is a circumstance that cannot escape the observation of the Court, that this nurse is not at all produced on this side. Why, it is impossible but that these two persons must have known every thing that happened upon this occasion.

Tomlins, however, is examined upon interrogatories as to this fact, and what she says is this; that in the morning the house-maid told her, that Mrs. Evans had been ill ever since three or four o'clock in the morning; that she the respondent, going up between eight and nine the same morning, found Mrs. Evans in bed, crying; when she told the respondent she was ill, but knew not what was the matter with herself; but the respondent, from the account she gave her, thought she was in labour; and the respondent almost immediately went down and told the circumstance to Mr. Evans; who desired her to send for the Doctor as quick as possible.

Then it is proved by this witness, that at this time Mr. Evans was down stairs, though Bobillier positively swears that he was shut up in the room with her till between nine and ten o'clock. He was then down stairs, and, upon the first intimation of an opinion given to him that she was going to miscarry, he did immediately order a doctor to be sent for as quick as possible. That he had not himself given any directions with regard to her, where is the wonder? why, were there not women in the house, upon whom that office naturally devolved? Mrs. Thackeray, her own sister, was in the house. Why, is it to be understood that on such occasions it is a duty which adheres so close to the character of husband, that it cannot by any possibility be discharged by deputy? Is it to be insisted that it was his duty, and his duty alone, to give such directions himself; and that it is a crime in him that he relies upon the discretion of the persons about her? This is such an imputation that would affect the character of almost every married man, if it was permitted to weigh for one single moment. However, he then came out of his bedchamber, as Bobillier says, but not before the arrival of Doctor Denman. She says, Mrs. Evans told her a great deal of conversation, and taking hold of her by the hand, begged her not to leave

her any more. This is one amongst many, of the proofs of that sort of unhappy intimacy, I think, which subsisted between these two persons. She goes on to say, that Doctor Denman being afterwards introduced, immediately told Mr. Evans, Mrs. Webb, and Mrs. Thackeray, that she was going to miscarry; and the said ladies last-mentioned thereupon sent for a nurse to attend Mrs. Evans, but Mr. Evans gave himself no concern about it. Why, what concern was he to give himself about it? The doctor was called, and the nurse was called. What then remained for the husband to do? I should have been glad to have had it stated, by either of these ladies, what the proper or possible conduct of a husband in such a situation should have been.

Bobillier then goes on to say, that he afterwards burst into the room in a very abrupt manner, so as greatly to alarm and terrify Mrs. Evans, who was then in the pains of labour, and said, that they had got his tea-pot; which was immediately sent out to him. Mrs. Thackeray mentions the same circumstance of the tea-pot; but not one word of this abrupt manner, which had the effect of frightening this poor lady, in this situation: all that she says is, that he put his head into the room, made enquiry after his tea-pot, but made no enquiry after Mrs. Evans. This then is the whole of the cruelty; that when he came, having some peculiar fancy for this tea pot, which, perhaps, was not in particular use at that time, he desired to have it out and retired without at that moment making a particular enquiry after his wife.

Another fact of cruelty is, that he refused the nurse the *elbow chair*.—That, every body knows, is one of the high prerogatives of these ladies, upon such an occasion; and one would have expected, that the nurse herself would have come forward, with no little acrimony, on such an account: but on the contrary, she is examined, and I don't find that this circumstance of the elbow chair has made that impression upon her mind, which it seems to have done upon that of Mademoiselle Bobillier.

I come now to that which is the most atrocious fact in the cause, and a most atrocious one it is—that after it was fully ascertained, that this lady was going to miscarry, this gentleman turned out the attendants, and kept this unhappy lady by force, with the pains of labour then upon her, to the manifest danger of her own life, and to that of his own infant, and kept her shut up, absolutely excluding all sort of assistance.

This is what is positively sworn to by this Mademoiselle Bobillier. I own upon the face of it, it is a thing grossly improbable; knowing, as every man does, the natural and laudable warmth of women respecting a business of this nature—the delivery of another woman. I think, therefore, it is impossible but that, if a barbarity of this nature had passed, nothing could have stopped the women who were in the house from making their immediate way to the assistance of this lady; and I am very sure, that nothing would have stopped them from making their way to this Court, to give a representation of what had happened. There is not a single witness who comes forward to say one word about it; and yet the nurse has been examined, who is stated to have been in the outer apartment, and to whom it is positively said to have given great uneasiness; Bobillier's words being, to the great surprise and disappointment of her mother, of this deponent (Bobillier), and of the nurse, who was uneasy thereat, for fear of the bad consequences which might attend the delay.

What the nurse says is this, that she has every reason to believe, that Mrs. Evans was, during her lying-in, attended by proper persons, and had proper assistance, comfort, and support; that she has seen Mr. Evans several times carry his wife in his arms, and treat her with great tenderness and affection; that she knows not that the premature birth was occasioned by the ill-treatment of Mrs. Evans by Mr. Evans, and never heard the same while she continued to attend her, and never witnessed any ill-treatment of him towards her. That Mr. Evans did not in her presence, or to her knowledge, when she was in labour, refuse to call any assistance, or oblige her attendants to leave her, or detain them from her, nor was her life in danger for want of proper or any assistance. This then is the account given by this nurse, who is vouched as a person upon whose mind this transaction made this deep impression.

Bobillier goes on to say, that she verily believes that the life of Mrs. Evans was in danger by the cruel behaviour of Mr. Evans towards her, as well during the night preceding the delivery, as during the time she was locked up in the room.

I have, in opposition to that, the evidence of Frances Tilbury, who was the house-maid; of Mary Tate, who was the nurse; of Mary Mayall the wet-nurse; of Dr. Denman, and of Mr. Paumier; and I ask if it is possible that all or any of this could have happened, and that not one of these persons should speak at all to the matter? Is it possible that they should have given a representation of it so totally inconsistent? But look at the conduct of the parties in this case. What is proved? Undoubtedly the mother, who had come at this time; undoubtedly Mrs. Thackeray, who was in the house at the beginning, must have fired with indignation upon such an occasion. But there is nothing of this sort intimated in the evidence of Mrs. Thackeray. The account she gives is simply this:—That she was at Mr. Evans's in January, 1788, and then saw her sister, Mrs. Evans, and staid there with her four days; that Mrs. Evans then spoke of her expecting to be delivered in two months from the said time; but that on the last morning of her being there, the deponent understood Mrs. Evans was very ill, and was in bed with Mr. Evans; and, being about seven o'clock in the morning, the deponent was alarmed by the account, and desired of the servant who told her of the circumstance, that the doctor should be sent for. Very properly, without doubt; Mrs. Thackeray was the proper person to have delivered these orders; and as to the formality of sending to the husband, that the orders might be delivered through him, that was a formality that might certainly be very well dispensed with. About nine o'clock in the same morning, Mrs. Thackeray says, she made enquiry whether the doctor had been sent for? when she understood to her surprise, he had not; on which she sent a message to Mr. Evans, desiring he would not delay a moment sending for the doctor, as he knew her to be in a very dangerous critical way. This is about nine o'clock; though Bobillier has sworn, that between nine and ten she found him shut up with her in the room, and that nothing had been done. Now, there is no proof in this case at all, that this message was delivered to Mr. Evans. However, Mrs. Thackeray goes on to say, that, understanding Mr. Evans had arose, she went into his room, and found Mrs. Evans in bed therein; that she was very feverish, greatly agitated, and in pain, and she thought her in labour; that, about eleven o'clock the same day, she, the deponent, was making tea for Mrs. Evans in her room, when Mr. Evans came to the

door, and, putting his head into the room, told the deponent, that she had got his tea-pot, but made no inquiry about Mrs. Evans; that shortly afterwards Dr. Denman came, and confirmed the certainty of her being in labour.

All then that I see proved in this case, by Mrs. Thackeray, is this; that she in the morning gave very proper orders, that the man-midwife should be sent for; that the man-midwife was not sent for, as he ought to have been, owing to the neglect of the person who received those orders, but not, as it appears, owing to the neglect of Mr. Evans: that between nine and ten, understanding he had not been sent for, she then sent a message, desiring that he might be sent for; and there is evidence over and over again in this case, to show that Mr. Evans not only did send, in the manner which has been mentioned, but that he did, what most husbands, I presume, don't think themselves under any moral obligation to do; and that is, that he actually took his hat, and went out upon the business himself. But what weighs most with me in this case, and which is constantly uppermost in my mind, and repels every intimation of this sort, is the consideration of what was the behaviour of the persons who must best have known, and most deeply have felt, the misconduct of Mr. Evans, if any such had existed.

Well, the delivery is effected, and is happily effected; the child is born.—Now, is it possible, that, after a behaviour so atrocious as Mr. Evans's is represented; is it possible that no resentment should have been expressed on the part of Mrs. Webb, the mother, and the other relations of the family? This is absolutely incredible. It is proved by Tilbury, that, presently after, Mr. Evans hearing the door of Mrs. Evans's room open, he went to it, and Mrs. Webb came to the door, and plainly told him, in her hearing, "Thank God, it is all well over with Mrs. Evans, at last!" on which Mr. Evans asked her what Mrs. Evans had got? to which she replied, a girl; and Mr. Evans, about an hour afterwards, went into the room. I here ask, if it is conceivable, for one moment, that a business of this sort should have passed off just as smoothly as if nothing had happened to have discomposed the temper of any one person who was concerned in it? That is absolutely impossible. Taking then the whole of this business, without entering into the more minute circumstances, the principal conclusion which I arrive at is this, that there is no one fact in this case which I shall take upon the credit of that witness Bobillier. Of the other witnesses I go the length of saying, that they have deposed with passion; but of her I have no hesitation to say, that she has deposed absolutely without principle.

The next charge is that of making the noises, and which is deposed to singly by Bobillier: there is not another witness who has spoken to it. Tate, the nurse, who must have heard these noises, and who must be a nurse, in the constitution of her mind, very different from all other nurses that one has ever heard of, if she was willing to dissemble this ill behaviour of the noises, she is not examined at all by them. Tomlins, the waiting-maid, who must have been frequently in the room, is not examined upon the subject. Mayall, the wet-nurse, is not examined upon the subject. On the contrary, here are a cloud of witnesses who depose the reverse. There would be no end of going through them all; there is Mayall, there is Frazer, Tate, Tilbury, who all depose, *unore*, that they know nothing of these noises, excepting, that when there

were noises, Mr. Evans interposed, and expressed a great deal of resentment; that he cautioned his servants against making these noises; in short, that he did as much as any master of a family can do to prevent the interruption of his wife's quiet.

As to his general attention to her during her illness—they have pleaded a total want of it; which, to be sure, would have been a very natural consequence of that which they have pleaded—his barbarous refusal to call assistance. But his attention to her is established beyond a doubt.—Tate speaks to it; Mayall speaks to it; Tilbury speaks to it; Dr. Denman speaks to it; Mr. Paumier speaks to it more fully. I do believe, that there is hardly a case, in which a husband could collect upon the subject so many favourable testimonies, as it has been the good fortune of this gentleman to bring together of that fact. (a)

(a) On the depositions of some of the witnesses referred to in this part of the case and on others; an allegation, exceptive to their credit, was given on behalf of Mrs. Evans; and *opposed*, on the grounds noticed in the observations of the Court. Which, as they discuss the general principles of evidence and of practice on these points, are introduced here.

Court:—This is an allegation exceptive to the credit of witnesses,—and it is objected, amongst other things, that there has been improper delay in introducing it. Some delay has appeared in the progress of the cause, but I see no reason for saying that the allegation is liable to a fatal objection on that account alone, if it is in its contents admissible. This cause was originally instituted by Mrs. Evans for a separation by reason of cruelty. In her libel she pleads, as is usual* though not necessary, and sometimes disadvantageous, *her virtuous education, and good disposition, and her excellent conduct in the characters of a wife and a mother*. One inconvenience arises from an article of this kind, that it gives opportunity and invitation to the other party to counterplead, in contradiction to this good character, as has been done in this case, in which a counterplea is given full of unfavourable epithets applied to her, and, amongst others, that she is a woman subject to habits of *intoxication*.

Now certainly it may go to the very point in issue, whether she is so subject or not; because many acts in a husband, which constitute legal cruelty towards a sober woman, may be acts of necessity towards one who is subject to such an odious infirmity. It might be no cruelty to deprive such a person of the management of her family, or to restrain, upon some occasions, her personal liberty. In this particular case, likewise, in which Mrs. Evans is pleaded "to be a woman of great morbid delicacy,"—if she was proved to be guilty of habitual intoxication, it would account for many appearances that might be referable to that cause.

It has been made a question, incident to the general argument on these objections, what is the duty of the Examiner? Whether he should have admitted particular specifications or not in taking the depositions. And it may be a matter of great difficulty to prescribe what an Examiner is to do in all cases. To lay down an universal rule is impossible; but, in general, he should strongly discline to receive specific facts, where the article, admitted by this Court, is in general form.

It must be understood to be the intention of the Court, where the articles in the plea are general, that the examinations taken upon it, should be likewise merely general. I will not say, that cases may not arise where a specification, under such an article, may be received, particularly in cases merely civil; but where it is introduced, such specification should be exact as to time, and place, and all other material circumstances: for, without such exactness, it remains little better than the general plea. The present case is brought for civil relief, but founded on a *criminal imputation*;—the charge is, that he has treated his wife with want of due tenderness;—and the vindication is, that she is a person of such habits as to make the want of tenderness in some degree justifiable. It thus becomes of a criminal kind as to her also. And in examining on the general charge of habits of intoxication, the examiner ought not to admit specification, but adhere to the form of the plea. And it is a general rule, that wherever specification is introduced, it shall be so exact, as to give the party full opportunity of defence.

Another rule by which the conduct of Examiners, particularly in these cases of character, should be guided, is, that the facts allowed to be stated must be plain and simple, and not such as will probably run into intricacy of discussion or ambiguity. In *Wilson v. Wetherell*, Prerog. 27th May 1789, which has been quoted by counsel, an *attack* was

* The practice has since been discontinued.

After this discussion, it would be idle for me not to say, that I do consider the whole imputation as an absurd calumny. I have no other way of accounting for the conduct of the relations. If the fact had

made, in an allegation, upon the *general* character of an individual. Several witnesses were examined upon it, and the Examiner let them run on into specifications. Some said, they thought him a bad man, because he had defrauded them, as members of a public company. Now, fraud itself is composed frequently of such ingredients, that, to establish it, might occupy an inquiry of some years in a court of equity. How, then, could this Court entertain, incidentally, and only as an excrescence from the original cause, a matter which might easily have overgrown the cause from whence it sprung?

These are general rules fit to be observed; and there is one more,—that if an Examiner entertains a doubt, it is safer for him to decide in the affirmative, and to receive what the witness can say, than to reject it totally; because the Court can do that at last, if it thinks proper; and there is no irreparable injury done by admission, as there may be by too hasty exclusion. Subject to these observations, I shall proceed to consider this allegation. The first article is general, and excepting to the credit of certain witnesses, as persons of *infamous character*, and not to be believed on their oaths. It has been disputed, whether such an article can be admitted substantively, or only as introductory, when offered *after publication*; and, most certainly, the practice has been a little fluctuating upon that subject. By the ancient text law, to which it is most safe, in such variation, to adhere, it cannot be admitted *substantively*. That principle is to be found in the Decretals, Decret. Greg. lib. 2. tit. 19. c. 9. Whether the more ancient practice of our own Ecclesiastical Courts may have deviated from this rule, I do not find; but it was considered as an existing rule in the case of *Cunnington v. Coxe*, Prerog. 28th June 1781, of which I have an exact note, “that as to the mere general character of a witness, the exception ought to be taken before publication.” This rule was for the first time within my memory, impugned in *Arabin v. Arabin*, Consist. 15th July 1786, Arches 15th February 1787, where there was an objection taken on *that ground*. The rule was sustained in the Consistory, and in the Arches; both those Courts being of opinion, that a general article merely ought not to be admitted after publication. The cause went to the Delegates, upon appeal on that point from the Court of Arches; where the party appellate being anxious, on private considerations, to have the cause heard on the principal merits, and not thinking that incidental point sufficiently material to retard the proceedings, consented to the *repeal* of the two former sentences, which passed, on motion, by consent, and wholly *sub silentio*. But when the cause came on for sentence on the merits, it was strongly signified to be the opinion of one of the Judges, that the old practice of excluding such matter was correct and proper.

In *Bailey v. Bradburn*, Consist. 27th November 1788, the same doctrine was held here very recently; and I understand the same to have been since recognized in *Raybold v. Raybold*, 8th December 1789, in the Court of Arches. I hold it, then, to be the known and existing law, and to which, till I am otherwise instructed by superior authority, I shall adhere,—that an article of this kind can be admitted only as an introductory article after publication. It must be observed, then, that it being merely introductory, the Examiner is not to examine it.

The first person excepted against is Mr. Finch Mason, an officer in his Majesty's service. And it has been said, that an attack of this nature is injurious to his character. But every witness, produced in a court of justice, is liable to such an attack; and it does not rest with the Court, but the party, if the attack is injuriously made. On this account, however, as well as on more general considerations, exceptive allegations are to be carefully watched. Parties state their case, and examine their witnesses, and it becomes occasionally an object with one party, having sinister designs, to lie by till after he has seen the depositions, and then to endeavour to get rid of such witnesses, as are most likely to operate to his disadvantage. Courts of justice, therefore, are tender in suffering evidence to be attacked in this manner, without strong reasons given for it. And where there is ground for it, the rule is universally laid down, that the exception taken must not be of an ambiguous nature; and the party excepted to, if on the ground of general bad character, must be attacked in such terms as plainly assert *that imputation*. This is the rule for exceptions “*contra personas*.” If the exception be “*contra dicta*,” that is, arising out of the depositions of the witness, it must be observed, that, by allowing such an exception, it is not meant that you are at liberty to controvert every declaration of witnesses, but that you may except to their credit and character, from what arises out of their depositions; and, to do this, it must be shown, that a witness has misrepresented the matter *corruptly* and *wilfully*. There must be what the law calls “*falsitas cum corruptione*.” Every man is liable to error; and, on the sup-

been as is pleaded, it is impossible but that they must have known it; and if they had known it, they must have been destitute of all common sense, and of all common humanity, if they themselves had not been forward in loudly demanding a separation the very day after it had happened.

From that time there is a chasm in the history of actual cruelty till the fourth of October 1788; of actual cruelty, I mean, so far as it is concerned in bodily acts. They travel, by the advice of Dr. Denman. Bobillier says, that Mr. Evans made disagreeable difficulties. What those difficulties were, I don't know; they might be real difficulties. Mr. Evans had not been able to settle his affairs in India, and it might have been very inconvenient to him to leave town; and the difficulties being real, might not be the less disagreeable for being real. But however they do travel; and there is a space of nine months, I think, in which his cruelty appears to have been in a pretty deep sleep. However, it was only the sleep of the lion; for, upon the fourth of October, an act of barbarity was practised, which, to be sure, is equal to any of its predecessors.

position, that a witness states his opinion from appearances, it is not merely from misapprehension, or from proof of his being deceived, that he is to be contradicted, in the way of exception to his credit; and that he is to be sent forth into the world as a person of disgraced character: this must be only from wilful and corrupt falsification.

38.2. How will this apply to Mr. Mason? The principal facts of his depositions are such, as, if contradicted, would not do more than affect him with inaccuracy or misapprehension. In one place he goes on to say, "that he once saw Mrs. Evans in a state of disorder from liquor," which, unless it means when he first arrived, and this is not averred, is objectionable for want of specification of time. The fact ought not to have been taken down without such plain specification, and being so defective, the Court would not regard it as evidence. If the facts alleged in contradiction to him, therefore, were all to be proved, it would not *invalidate* his testimony as to his belief, I will not say however that it might not perhaps warrant an application to the Court to open the cause for a defensive purpose. On this point, I think the general and correct rule is, that wherever the matter is originally laid down in the libel or allegation with due specification, you shall not be at liberty to introduce a contradictory plea, on account of any thing which arises on the depositions of the witnesses. But if there is such want of sufficient specification in the plea, you may then be at liberty to do it. I find this to be the text law as laid down in the Decretals, in a case of an *abbi* referred from England to Rome for decision, (Decret. Greg. lib. 2. tit. 20. c. 35. Mynsinger in loc. p. 68.) *Panormitan** also lays down the rule to the same effect. And he goes on to state, if there has been a failure of due specification in the original articles, "*tunc admittitur*." And it is the true rule, that if a fact, material in the case, has been pleaded without such specification, as would enable the party to apply his defence to it, by way of counterplea, and he is therefore in some degree taken by surprise, on the particulars stated in the depositions of the witnesses, it is in the discretion of the Court, under great caution, to allow him to give in a defensive plea after publication. But it would relax the rules of evidence in a way liable to abuse, and open to perjury, if I permitted that fundamental rule to be departed from, and, after publication of evidence, on a plea laid with sufficient specification, suffered the matter to be the subject of re-examination, merely because the witness had deposed circumstantially, and so as to be capable of being contradicted on some incidental points; as there can hardly ever be a cause in which some of the witnesses will not disagree with others on trifling circumstances.

It appears to me, that if the witnesses were to prove every thing laid in the exceptive allegation as to Mr. Mason, it would amount to no more than to show him to be mistaken, and not to show that he is a corrupt man. I therefore reject that article, and direct his name to be struck out of the general introductory article, in conformity to what I have before observed. Another witness objected to is Benjamin Frazer, the butler.—Some parts of his evidence are recited, to which a direct contradiction in fact is pleaded, but others, which are mere matter of appearance, and so incapable of precise contradiction. What he has stated, as matter of fact, may affect his credit, if

* "*Sed tamen falsitas directa admittitur post aperturam propter oblivionem debite specificationis articulorum.*" *Processus Jud. Ord. tit. "Probatio forme," et seq.*

It is stated in this way in the libel:—That, after Mrs. Evans recovered from her lying-in, Mr. Evans would seldom let her lie at her ease in her bed, he frequently thrusting his elbows and knees into all parts of her back, sides, and loins, and thereby greatly hurting her; that in the night of the fourth day of October 1788, Mr. Evans and Mrs. Evans being in bed together in their house in Conduit Street, he, without any cause or provocation whatever, began to quarrel with and abuse his said wife, and with great force and violence seized her, and dragged her to every part of the bed; beat her head against each of the bed-posts, and twisted, distorted, and forced her limbs to so violent a degree that he brought her feet close up to her mouth; in which condition she swooned away; and in that helpless state, after giving her several dreadful blows and kicks, which caused the blood to issue from her mouth and other parts of her body, he turned her out of bed naked on the floor; in which condition, helpless, and apparently lifeless, she lay a considerable time, until her piercing cries brought three women from different parts of the house to her assistance, who found her naked on the floor, with her mouth full of blood, to all appearance dead; her limbs quite cold and stiff, and her legs crossed, and so twisted, that it was with great difficulty they could extricate them, and which they could not begin, until she showed some appearance of returning life, and could not effect until they had been with her upwards of an hour; and that, by the aforesaid cruel treatment, Mrs. Evans was put to great pain and anguish, and her life was in imminent danger; and on the next day several marks and bruises were very plainly to be seen on various parts of her body.

There are three women, therefore, who are vouched in this case; that is, this Bobillier; there is likewise a person of the name of Glover; and there is Tomlins. And this is the only fact of barbarity to which Tomlins is called to depose: she speaks to all other circumstances of Mr. Evans's behaviour towards his wife with the utmost partiality. As to Bobillier's testimony, I have already expressed myself in pretty strong terms of the opinion which I entertain of the truth of any assertion which comes from that witness; and therefore, certainly, in weighing this business, I shall pretty much lay her out of the question. I

satisfactorily contradicted, and therefore, I admit so much of this article as may establish such contradiction; but I reject the rest; and this article must be reformed accordingly.

With respect to the exceptions which are opposed in this allegation to the other witnesses, Glover, Newland, Tilbury, and Dr. Denman, they are* all reducible to one or other of the general heads, on which I have already observed. They either assign contradictions, which do not involve any impeachment of credit, or they apply to specifications, which ought not to have been introduced into the depositions—or are so imperfect, as not to afford the means of defence, and, on that account, will not be received as evidence; or they lead to re-examination, on points which have been already fully in issue between the parties, and which ought, therefore, not to be examined to again. There are parts of the depositions where the witnesses have spoken definitely as to time. I do not say that the conclusion of the cause might not be rescinded, in order to counterplead where they have thus spoken. But when they have spoken indefinitely, I shall not permit a contradiction to what does not, in itself, amount to evidence.

With these considerations, I reject the particular articles mentioned, and direct the names of the witnesses in the rejected articles to be struck out of the general article, and shall suffer the rest to stand for admission when reformed.

* This remark was confirmed by detailed references to the allegation and depositions.

will only just observe upon one circumstance, which shows pretty clearly the degree of alloy with which her evidence must be considered as debased. She describes herself as coming into the room at midnight, and finding Mrs. Evans in the situation stated in the libel, and to which she speaks very fully. She then says, that after Mr. Evans had retired and with great unconcern [certainly a very odd appearance for a man to assume, taking the story to be real], she staid with Mrs. Evans till two o'clock in the morning, when Mrs. Evans recovered from her state of insensibility. So that this poor lady, according to Bobillier, had been lying in this deplorable state from midnight till two in the morning, and then awakened to give an account of what had happened to her!

Now it is positively sworn by Tomlins, that the lady was actually restored, and that she herself had taken Mr. Evans's night-clothes into another room; that she was afterwards called in by Mademoiselle Bobillier, and was ordered to deliver a letter, which was written to be sent to Mr. Thackeray, *at one in the morning!* and it does so happen, that Mr. Thackeray himself deposes, that this letter bore date at one. Yet this witness, in order to augment this transaction, pretends to state, that it was not till after two that Mrs. Evans awoke, and that consequently it must have been after two that that conversation took place between her and Mrs. Evans, which produced the writing and the sending of this letter. However, the account given lies between Glover and Tomlins; and the account that they give, in substance amounts pretty nearly to this:—That Mrs. Evans was found certainly in a situation of apparent distress; what produced that distress *non constat*; for every thing had passed in the room between Mr. Evans and herself before any body was admitted. One witness says, that her mouth was full of blood. The other witness says, that she saw nothing of blood. The account given of what had passed in *recenti facto*, is given to me simply upon the credit of the French lady; and I am decidedly of opinion to take no fact upon the credit of that witness alone. I am then not ascertained, by that witness's singly telling me so, that Mrs. Evans did at that time give this account.—That there had been something of a struggle, in the course of which Mrs. Evans fell out of bed, or threw herself out of bed, or was thrown out of bed by Mr. Evans, these are the three possibilities which might have happened. But, supposing I got at it as a fact, that she was actually shoved out of bed by Mr. Evans, I must still go farther, in order to establish a case of cruelty; for I must go to the extent, that this was done intentionally, and not by accident. Both the fact and the intention must be proved, to make it a case of cruelty; I certainly shall not presume circumstances in order to make out such a case.

It has been asked, and very properly asked, Don't courts of justice admit presumptive proof? Do you expect ocular proof in all cases?—I take the rule to be this—If you have a criminal fact ascertained, you may then take presumptive proof to show who did it;—to fix the criminal, having then an actual *corpus delicti*. Show me, then, in this case, that a crime has been committed, and I shall not be at a loss to fix the criminal: but to take presumptions in order to swell an equivocal fact, a fact that is absolutely ambiguous in its own nature, into a criminal fact, is a mode of proceeding of a very different nature; and would, I take it, be an entire misapplication of the doctrine of presumptions. This fact, then, not being a criminal one upon the face of it, and being subject to

three or four different interpretations, all of which are perfectly innocent, I think myself by no means at liberty to say, that I ought by presumption merely, to make out this fact to be necessarily an act of delinquency.

However, what weighs more with me than all this, again, is, what I perpetually resort to in this case—the *evidentia rei*; the conduct of the parties: that always arises in my mind. Upon any other supposition than Mr. Evans's innocence in this case, the conduct of every person who appears in the business—the conduct of the party—of the witness—of the agent—in short, the conduct of every body, is the most unnatural that can be devised; it is directly the contrary of what every rational person in that sort of situation would have pursued. Whoever reads the description in the libel, and then recollects the extreme bodily weakness of the person who was racked and tormented, and in this variety of almost inexplicable ways, as they have been well stated to be, must suppose, that she must have continued, for many days afterwards, in a very languishing state, and in a situation of great personal hazard; that her body must not only have been greatly bruised, but must wonder that it did not appear entirely dislocated the next day. Now, where are the medical persons in this case? Was no assistance of that kind invoked? Surely Mr. Evans could not have prevented the interposition of aid of that nature, because the matter was immediately communicated, and consequently assistance, if necessary, must have been called in. Mr. Thackeray, to whom a letter had been sent, [Here again I see the finger of this busy incendiary, this Mademoiselle Bobillier] Mr. Thackeray, like an affectionate brother, comes at the first call.—There is some difference in the account of the witnesses as to the time when he came. Bobillier says, it was between the hours of nine and ten. Mrs. Evans comes down to Mr. Thackeray—one would suppose that she came in a situation of great visible peril—there is nothing of that sort, as far as I can see. He inquires what was the matter—she declines at first telling him—then Mr. Evans takes up the matter, and begins to tell it—she stops him short, and gives the history of it herself; and the only particulars which stick upon the mind of this gentleman—a man of sense, and of strong attention to the cause of his sister-in-law—the only particulars which stick upon his recollection, and which he states to me, are, that Mr. Evans had hurt her with his elbows, and violently shoved her out of bed. Now, I ask, is this account consistent with the variety of tortures that were applied to this poor lady, who was racked in the way that she is stated to have been in the libel? Is it possible that these two circumstances, and these two circumstances alone, should, in such a case, remain upon the mind of this gentleman?—It is most highly incredible.

But the matter does not rest there. The consequences, whatever they may have been, were not in the slightest degree visible. Witnesses have been examined to them: there is particularly Jessop, who swears, that he saw her at dinner the next day, just as usual. Fraser saw her at dinner the next day, just as usual. In short, she appears, upon a reconciliation which then took place with her husband, to have appeared just in her usual guise, without any alteration of body or mind. And when I have the total silence of all the persons who must have been able to speak to the fact, if it had existed as a matter of any consequence at all, I cannot help giving the whole business up, as a matter absolutely without weight or any significance whatever.

In the conversation which then took place, Mr. Thackeray was convinced that a separation was necessary; and then, as far as I can conjecture, was convinced of it for the first time. He accordingly proposed it. Mr. Evans was urgent for it. Mrs. Evans was violently averse to it.—Now from thence I collect three things.

First of all, that Mr. Thackeray never could have heard of the previous brutality which had been charged upon Mr. Evans; because if he had, there could have been no question but that he would have had that conviction in his mind long before.

The second that I collect is, that if Mrs. Evans had sustained these horrid outrages, it is most extremely unnatural, that she should herself have been averse to a separation; the mere love of life would have induced her to desire it. The gentlemen say, and say very truly, that it is very hard that this should be pressed to the disadvantage of Mrs. Evans's character, that she was willing to continue with her husband; and so it would be: but it is not pressed to the disadvantage of her character; it is pressed only to the disadvantage of the truth of her case. Yes; but it is next said, It was the love of her children. Clear it is to me, from a fact which I shall afterwards mention, that it was not the desire of continuing with her children that operated in her mind, as a motive to make her feel a repugnance to the separation proposed.

Mrs. Evans's counsel have made very strong appeals to the humanity of the Court, and have said, what a prodigious cruelty I should commit, if I were to send this lady back again to this gentleman, after such cruel usage. There would be some colour for that, if I did not find that this lady herself, after almost every thing which they have stated to the disadvantage of this gentleman had passed, nevertheless remained firm in her attachment, and remained extremely desirous of continuing the cohabitation.

In the third place, it seems to me highly unnatural, that Mr. Evans, if I am to consider him as a person labouring under the conviction of this deep and detected guilt; it appears, I say, extremely unnatural that he should be the party to assume the tone of complaint, of disaffection and dissatisfaction; and should be the person to clamour for a separation. As to his declining to state grievances to Mr. Thackeray, I own I see many reasons why he might decline doing it, without any impeachment either of his own innocence, or of the honour of the gentleman whose jurisdiction upon that occasion he thought fit to decline. If a man has a dispute with his wife, which turns upon facts that are in controversy between the two, I do not think the relations of the wife are the proper tribunal before whom the husband is bound to answer.

This quarrel, however, was made up, yet it was but "*gratia male sarta*;" for, after cohabiting together for some time longer, their harmony is again interrupted by an act, or an accident, which happened at the latter end of November. It is related by Mrs. Newland and Mrs. Webber. For as to Bobillier, I say again, that no credit is due to her.

It is, as is pleaded in the libel, to this effect:—That at the latter end of November, or beginning of December, Mrs. Evans being in the drawing-room of their house in Conduit Street, in company with two ladies and her eldest daughter, Mr. Evans came into the room and seated himself on a sofa, and asked her what book she was reading: that thereupon she immediately went to him with great good humour, and, by way of answering his question, continued to read aloud a part of the

book which she had before been reading; upon which he pulled her on his knee, where she sat some short time, when he, without any cause or provocation whatever, in great passion, suddenly and violently, and with his greatest force, threw her from him on the hearth-stone, and thereby greatly hurt and bruised her.

The account given by the two witnesses whom I particularly point out in this case, Mrs. Newland, a sister of Mr. Evans, and Mrs. Webber, who is a particular friend of Mrs. Evans, is this:—

Mrs. Newland does not depose at all as to the fact of throwing down, for she did not see it. All that she saw was, that Mrs. Evans came and sat upon his knee; that he complained of the interruption of something that he was reading; and the next thing she saw was, this lady rolling upon the hearth. So that her evidence, taking the whole of it, cannot affect Mr. Evans. Well, but it is said, from her account it nevertheless appears that, immediately upon the occasion, Mrs. Evans brought home the charge to Mr. Evans; for, as Mrs. Newland deposes, on his offering to assist her up, she said, "You brute, let me alone." Mrs. Webber says, that Mrs. Evans expostulated with him in a mild manner, when he offered to assist her; but the manner is this, "You brute, let me alone." And she then rolled from him, and got up without assistance.

Now, taking it that Mrs. Evans did suppose, at this time, that it was the intentional act of Mr. Evans, still her supposition is not sufficient for the Court to raise an evidence of actual intention upon it. Mrs. Evans, prone to take offence, might perhaps ignorantly ascribe that to design which was the mere effect of accident. To take that, then, for the true representation of the fact, upon the single ground of her supposing it so, would, I think, be going a very dangerous and unreasonable length of admission indeed.

But what is the account Mrs. Webber gives of this business? She speaks very imperfectly to a great deal of what passed. She admits her hearing not to be very good. She says, however, she saw Mr. Evans lift up his knee, as she could plainly discern, and Mrs. Evans then fell down upon the hearth before the fire, near to which Mr. Evans was sitting; on which the deponent, who was very much frightened, screamed out, and said, Good God, sir, how could you do so? or, how could you be so cruel?

In the first place, supposing the fact that this lady did actually see what she says she did see; is it at all a necessary conclusion, or what have I to satisfy me, that this small motion on the part of Mr. Evans, which possibly might have been made with an intention to dislodge his wife from her seat, was yet done with the intention of producing the consequence which it produced, namely, that of tumbling her down upon the hearth and hurting her considerably? She comes and seats herself upon his knee. She enters into a conversation with him. A husband is not always in a disposition to converse with his wife. She upon that occasion continues there. He makes a motion to dislodge her from her position, and this consequence happens, that she falls upon the hearth. He immediately, as it appears, attempts to give assistance, which she repulses in the way that Mrs. Newland says, "You brute, let me alone." The other witness, Mrs. Webber, says, that she upon the occasion exclaimed, Good God, sir, how could you do so? to which he answers, He did not intend it; which answer this lady chuses to call

an *equivocal* answer, but which appears to me as *direct* an answer as could be given. Is there any thing like an equivocation, or ambiguity, in that answer?—Taking the utmost of the fact, then, upon the evidence of these two witnesses compounded together, for, as to weighing minute circumstances, there is no end of it, there might be perhaps a little want of caution, a want of some little attention at the time, just at the moment of removing this lady from his knee: but that there was an intention of cruelty; that there was an intention that this lady should be affected by the slight motion, to which perhaps he involuntarily had at that time recourse; I have nothing in the world that applies to my mind, with any degree of force whatever, to satisfy me that it was so.

21, 3,
23. But, what was the effect of this fall? And here again I resort, as I must do from beginning to end, to the conduct of the parties—That is the key by which, I think, every thing here is to be unlocked. Why, Mrs. Evans had been, it seems, reading a novel for the entertainment of the company—This accident, as tragical as almost any that happens in a novel, happens at this time; and what is the consequence of it? What is the impression it makes upon the mind of Mrs. Webber herself at the time? Why, having given a detailed account of this cruel transaction, she goes on to say, that she remembers she regretted much the entertainment that she had lost by the discontinuance of the reading of the novel. That is her impression. The lady sees an act of horrid barbarity performed, and what is uppermost in her mind is, the loss of the reading of this novel, which had been the entertainment of the evening. However, it did happen that she was not even deprived of this entertainment, because she goes on to say, that Mr. Evans staid in the room, and he read the novel. Then I have this fact, that, after an act so brutal as this was, these ladies not only continued in the room with the monster, who had been guilty of it; but submitted to receive from him the entertainment which they had been prevented, by his behaviour to Mrs. Evans, from receiving from her. I do think, then, that the coming afterwards and representing such a matter as this with any degree of gravity, is absurd and ridiculous in the highest degree.

11.350. It must also be observed, that Mrs. Evans herself came down that night after supper; and it has been made a proof of great barbarity on the part of Mr. Evans, that he observed to a gentleman who supped there that night, that the poor thing was not very well. Now, that depends entirely upon the manner of saying it, whether it is to be taken as an expression of "insult" or of condolence; of the condolence of a very affectionate husband, sorry perhaps that he had not practised all the care and attention in that matter, which an affectionate husband might have wished to have done. He might then have very well said, the poor thing was not very well. But that it was done with any intention to insult her feelings—to be sure, the manner in which this Mrs. Webber has deposed to her own feelings on the occasion, abundantly satisfies me that it could not be done with any such intention.

Now, here concludes the history of personal cruelty, so far as it consists in personal and corporal acts. An history very heavy and formidable in its commencement, while it rests in mere *allegation*; but which grows weaker and more insignificant every step as it advances towards *proof*. Comparing the charge and the proof, I think it, then, my duty to discharge that debt which the justice of this Court owes to the character of Mr. Evans, by declaring, that, upon the most careful and the most conscientious investigation of it, this prosecution, so far as

it respects these facts, is unadvisedly and unwarrantably brought. I therefore fully exculpate him from that charge of unmanly cruelty, which is founded upon these facts; and I do very sincerely regret, that, under any advice, this poor lady should have preferred so black an accusation against her husband, and one so totally destitute of all reasonable colour.

On the 23d of December, Mr. Evans took the resolution of finally separating from his wife. It is pleaded in the fourteenth article of the libel, that he did arbitrarily, and without any cause or provocation whatever, deprive his wife of all government in his family, and authority over his servants; and that he did, on or about the 23d of December 1788, finally withdraw from her, and without cause.

From stating the deprivation of authority first, and the separation afterwards, one would suppose that he had deprived this lady of authority in his house, before he quitted it himself; and to that effect, Tomlins positively swears;—that “some time about the fourth of October, he gave her orders not to obey Mrs. Evans, but to obey other persons,” who are there mentioned. This, however, is erroneously and carelessly stated; because it is most positively contradicted by all the other servants who are examined—Odell, Fraser, Glover, Jessop; all of whom are examined upon the thirteenth article, and who say, that this deprivation of authority did not take place while Mr. Evans continued in a state of cohabitation with her. However, there is a fact which comes out upon the evidence of Odell, and it is this; that Mr. Evans had taken into his own hands something of the department of the house economy: I don't think it very clearly appears what.—It is upon the third interrogatory, to which she answers, that Mrs. Evans declined giving orders, when the respondent applied to her, soon after her first going to live in her service, which was, I think, upon the first day of November, and told her to go to her master; that she would not take the management of the house; that, as Mr. Evans did part he might do the whole: and she could not then settle her bills; in consequence of which he took the management of all his household concerns; and on a new servant coming, the respondent told Mrs. Evans of the servant's coming to be hired; but she would have nothing to do with it, on which Mr. Evans hired her; and he did not, to her knowledge, refuse to permit her to hire a maid-servant, or to do any other domestic office of that or the like nature.

The counsel have taken up this quarrel pretty strongly in behalf of Mrs. Evans, and have inveighed very loudly against the barbarity of a husband, for taking into his own hands any part of the family economy; but, in my apprehension, a good deal without reason. I cannot call it cruelty, if a gentleman chuses to settle his weekly bills himself; because, I take it, that a wife acts in this respect not by any original right, but as the steward and as the representative of her husband. And if a man has but a moderate opinion of his wife's management, and is vain enough to have a better of his own, if he does chuse to take into his own hands the payment of the weekly bills, I protest it does appear to me to be that kind of conduct with which no magistrate, ecclesiastical or civil, has any right to interfere. I say, I see nothing in that; but I do see, here again, on the other side, a proneness to take offence; a disposition to revolt; a disposition to return a supposed insult by something very like disobedience.

On the 23d of December, Mr. Evans took the resolution of finally separating from his wife. There had been for a time growing dissensions, which had frequently ripened into proposals for a separation; and these proposals, which had always come from Mr. Evans, had been withdrawn upon the interference of friends, and the parties had become half reconciled.

In September 1788, he had very abruptly quitted Mr. Thackeray's, where he had been upon a visit with his wife; and he proposed a separation in a letter, the contents of which are stated in a great measure, by Mr. Thackeray. Now, there could have been no fact of cruelty at that particular time, which gave occasion to the desire of a separation; because Mr. Thackeray swears that he does not know the occasion of this quarrel, though it clearly happened at his own house. It could, then, have been no more than mere private disagreement. In the separation proposed was this circumstance, that he had acceded to her having the charge of the children. After this, I can never surely admit it to be said, that the reason why this lady chose to remain with her husband was, an apprehension that she might be debarred of the comfort of her children; because, the terms of the separation then proposed were, that she should have the charge of the children. Mr. Thackeray, very prudently anxious for a reconciliation, as I think he was, supposing him ignorant of all these atrocious facts of cruelty, he, after all this, wrote a letter to Mr. Evans—stating what?—"Mrs. Evans's uneasiness, and her anxiety for a reconciliation;" though she was then either in possession of the children, or at least had the possession of them absolutely secured to her. It is impossible, then, for me to suppose one moment, after this, that her anxiety for a reconciliation proceeded from any thing else than an attachment to her husband.

Mr. Thackeray says, he requested a meeting; Mr. Evans declined it, but desired the means of meeting a third person, after Mrs. Evans had agreed upon a separation. I see nothing that is at all particular in that. It seems to me a proper caution on his part, that he should have desired to have his family controversy submitted rather to the judgment of a third person, than to the judgment of a person, who, though a very honourable man, was yet, it is to be remembered, the brother-in-law of Mrs. Evans. However, a reconciliation was effected at this time, and the parties lived together again until October the 4th, when the accident happened which I have before described.

Then again Mr. Evans insists, as he always does, upon a separation. He is the party always insisting upon that. Mr. Thackeray, for the first time, then yields to the necessity of the case; though he clearly yields with a good deal of reluctance. However, by the good offices of Mr. Henniker, they are again half reconciled.

On the 23d of December, Mr. Evans withdraws himself totally, taking with him the person of his eldest daughter; and offers to Mrs. Evans, in a letter, which has my notice, because it has been noticed by the counsel on both sides, a settlement of 500*l.* a year. The letter, though written in the height of irritation, does not insinuate that species of misconduct with which she has been improperly charged in his allegation; it only charges her with "intolerable manners."

Here, I think, that an impropriety, for the first time, attaches on the conduct of Mr. Evans; for Mr. Evans must be informed, that the law of this country, and of every Christian country, does not allow a man to

use the language, "I will be separated from my wife."—If Mrs. Evans had been guilty of any misconduct for which the law would decree a separation, he would be perfectly right in withdrawing himself; but, in all cases where the law does not pretty positively allow, it pretty positively, I believe, condemns.

Marriage is the most solemn engagement which one human being can ^{8 Paige} contract with another. It is a contract formed with a view, not only to the benefit of the parties themselves; but to the benefit of third parties; to the benefit of their common offspring, and to the moral order of civil society. To this contract is superadded the sanctity of a religious ^{65.} vow. Mr. Evans must be told, that the obligations of this contract are not to be relaxed at the pleasure of one party. I may go farther; they are not to be lightly relaxed even at the pleasure of both. For, if two persons have pledged themselves, [at the altar of God, to spend their lives together, for purposes that reach much beyond themselves; it is a doctrine to which the morality of the law gives no countenance, that ^{489.} they may, by private contract, dissolve the bands of this solemn tie, and throw themselves upon society, in the undefined and dangerous characters of a wife without a husband, and a husband without a wife. ^{4 John. 191. 6. 3 Paige 272. 55.}

There are, undoubtedly, cases for which a separation is provided; but it must be lawfully decreed by public authority, and for reasons which the public wisdom approves. Mere turbulence of temper; petulance of manners; infirmity of body or mind, are not numbered amongst those causes. When they occur, their effects are to be subdued by management, if possible, or submitted to with patience; for the engagement ^{7 H. 259} was to take for better, for worse: and, painful as the performance of this duty may be; painful as it certainly is in many instances, which exhibit a great deal of the misery that clouds human life, it must be attempted to be "sweetened" by the consciousness of its being a duty, and ^{5 H. 41.} a duty of the very first class and importance.

Mr. Evans, in determining to quit his wife, does that which the law does not approve, and for which it provides a remedy. But the remedy is certainly not that which is sought for in the present suit; the remedy is the *remedy of restitution*. It would be absurd to suppose that the law which furnishes that remedy, furnished at the same time another remedy which is totally the reverse of it, and totally inconsistent with it. To say that the Court is to grant a separation, because the husband has thought fit to separate himself, would be to confirm the desertion, and to gratify the deserter: and the Court would then become the perpetual instrument of these voluntary and illegal separations.

I can never, therefore, make desertion a ground of separation, though, ^{304.} in conjunction with acts of cruelty, it frequently is; and, though it may be thought hard to send a wife back to a husband who has given her such a proof of alienated affections, yet the Court does not send her back without due care for her reception; for the monition is, not only that ^{363.} he shall take her back, but that he shall treat her with conjugal kindness; and though the Court cannot interfere in the minute detail of family life, for much must ever be left to the consciences of individuals, yet the Court will see its monitions so far obeyed, that the great obligations of conjugal duty shall be complied with.

What I have to say upon the remaining part of this case will be comparatively short, because every thing that follows in this history arises out of this act of separation; and I have already said, that this suit is not

the proper remedy for a complaint for separation. The true remedy cannot be obtained by this suit; for it is a mistake to say, as it has been said on this occasion, that in the present suit I can issue a monition to either party to return. This suit can lead to no such sentence.

48.298 Mr. Evans quits his wife, and, in that respect, does an improper thing; that improper step is followed by others of the same nature; for there is no such thing, and one has often occasion to observe it, as doing an improper thing with strict propriety. He is charged with having denied to his wife access to her child. If the fact were true, though he certainly might do it, yet I should deem it a most improper exercise of the marital power, very disgraceful to the person who practised it, and a most wanton and unnecessary outrage upon the feelings of a mother. 146. But the evidence, as far as it goes, does not, in my apprehension, support the imputation. In his letter he expressly engages that access shall not be denied. Mr. Henniker, who carried that letter, knowing its contents, is to be considered as guarantee of that engagement. As to the letter mentioned by Bobillier, of a contrary effect, I take that to be one of the many fictions with which that lady has thought fit to adorn her evidence. And as to the taking her away to a boarding-school, though I do wish it had been done with less privacy, and less precipitation, as that would certainly have been more prudent; yet the placing of the child in a place of education, does by no means prove that he meant to debar her the sight and access of her mother; and therefore I do not hold that fact to be proved in this case.

When Mr. Evans quits his wife, he withdraws not, as is insinuated in the libel, a proper contribution to the support of his wife; but he does withdraw, I think, a proper mode of making that contribution. He commissions his agent, Mr. Jackson, in conjunction with Mr. Evans senior, to furnish all necessaries for Mrs. Evans and the family; he offers 500*l.* a year separate maintenance; and this furnishing of necessaries was, as I understand Mr. Jackson, merely provisional till some settlement was actually made. He leaves directions with the servants, of which a copy is exhibited, certainly drawn in terms sufficiently peremptory, in which he refers those servants for all orders to Miss Evans. Now this is, certainly, a situation of dependence and indignity in which Mrs. Evans is placed. It is putting her, for the supply of her necessities, into the hands of his sister and his solicitor. But then, I must remember the fact, that Odell says, that at this time Mrs. Evans had abdicated the government of the family, in consequence of the offence which she had taken at some conduct of Mr. Evans. She had refused to carry on the family business. Somebody must take care of the house. If Mrs. Evans would not undertake it, perhaps Miss Evans was as proper as any body else. To be sure, if Mrs. Evans had at this time signified her desire to act as mistress of the house; if she had remonstrated at this moment against this entire transfer of domestic authority, there would have been ground of complaint; but I think Mr. Evans, under the circumstances, had no reason to presume, that she would have done that under a state of separation, which she had refused to do, living in conjunction with him. Though I think it is a degradation under which she ought not to remain; yet I cannot help thinking that she has herself very largely contributed to place herself upon that footing.

It is charged, in the next place, that he deprived her of all pecuniary credit. I should be unwilling to remark, that, if proper supplies were furnished by the attention of Mr. Evans senior, and Mr. Jackson, credit

was not absolutely necessary. However, the proof of the fact is this; that Sir Herbert Mackworth, his banker, and Mr. Boehm, were forbid to furnish her with money, as proved by Mr. Moore, without his written order. Now, I protest that I have never understood it to be a part of the prerogative of a wife, that she shall have a right to draw for what she likes upon the banker of her husband. The purse is her husband's; and it seems to me a matter of indifference, in its own nature, whether the supplies pass through the hands of Sir Herbert Mackworth, or Mr. Jackson and Mr. Evans. It is necessary, undoubtedly, to supply her with money; but the mode of doing it by a banker, I suppose, is not absolutely necessary: I do not take it to be perfectly usual. He had indulged her before with an unlimited liberty of this kind, which, upon the separation, it is proved he withdrew. That under the present circumstances he should not leave her an unlimited power of drawing upon his banker, nobody could wonder. And as far as 500*l.* a year went, he professed, and gave every evidence of sincerity in those professions, that he was ready to leave her that power. No proof, here again, is offered that Mrs. Evans ever requested any money of him. If a husband, upon request, refuses to furnish necessities, either by himself or his agent, undoubtedly he is culpable; but if a wife does not think fit to make any request or demand, it is going too far to fix upon a husband cruelty, merely because he refuses one particular mode of supplying her with money, and which mode he was never bound under any circumstances to practise; but which in the present case, as far as it appears, he has never even been requested to conform to. The fact is, that finding her credit stopped at the banker's, she trusted, as well she might, to the kindness and liberality of her relations; and, without making any application to her husband, as I see, avails herself, not very advisedly, of this as a circumstance on which to found a charge of cruelty.

He is charged, in the next place, with refusing her the aid of medicine, and that, with that view, he sent Mr. Jackson his attorney, to Mr. Paumier, to forbid him supplying her with medicines. They have both been examined, and they differ in their evidence. Mr. Paumier says, he received orders from Mr. Jackson. Mr. Jackson swears, he accidentally met Mr. Paumier, who asked if he was to attend her on Mr. Evans's account; that he declined giving any directions, as she had left the house; that he never forbid any person from giving her credit, nor was ever sent for that purpose by Mr. Evans; nor did he, nor did Mr. Evans ever, to his knowledge, forbid any person from giving her credit. Then, I am either to suppose that Mr. Paumier misunderstood Mr. Jackson, which might easily be, or that Mr. Jackson delivered those orders of his own head; for he does positively swear that he was never sent with any such orders from Mr. Evans; and in order to affect Mr. Evans with this fact, he must be the orderer. Supposing it to be fixed upon Mr. Evans, it might still remain, I think, for consideration, how far the discharging of Mr. Paumier, who, for any thing that appears, was not particularly desired by this lady to attend her; how far the discharging of him merely from the obligation of attending on Mr. Evans's account, is to be deemed an act of cruelty; more particularly where the husband knew, as he could not but know, that she was under circumstances, where she was sure to receive every assistance of that kind from her relations. I do think, to call this a refusal of all necessa-

ry medical aid to a person who was ill, does seem to me to be putting upon such a business no very fair colour.

439. That a woman, under such circumstances as she now was placed, should not chuse to continue any longer in the house, is not to be wondered at. It was certainly a state of indignity. But, Mr. Jackson positively swears, that he offered no violence; that he threatened none; that he was not authorized to do either the one or the other; and that it was a matter of considerable surprise to him when she quitted the house. To me, however, I own, it would have been a matter of surprise, if she had continued there, considering the footing upon which she then was. Mrs. Thackeray swears, that she saw two or three letters from Mr. Jackson, intimating that Mrs. Evans must quit the house, or he would take steps that would be disagreeable. Now, taking it that Mr. Evans meant to have two houses, two separate establishments,—to have an establishment necessary for the wife,—to be sure a less house would be sufficient for her in consequence of this separation, and no just cause of complaint could arise, unless the house to which she was desired to withdraw was such an one as it was improper for the wife of Mr. Evans to inhabit; for, I cannot but say, that a husband has a right to direct the removal of his own family.

There is another matter, which has been made a pretty long subject of discussion in this case; a matter of trunks and boxes, which has been introduced into the allegation, but not into the libel. One representation is given of it by Mr. Jackson; another by Mademoiselle Bobillier: + and I think I do not pay any one individual any sort of compliment, when I say, that I shall take his deposition in preference to hers.

10. x After all, there are, certainly, circumstances sufficiently hostile attending this separation. I wish it had been conducted with more care; —with more caution;—with more tenderness, on the part of Mr. Evans; for care, caution, and tenderness, would have been prudence. I must however remember, that there were at this time declared hostilities subsisting;—great mutual exasperation. It was now become a contest of etiquette, of honour and spirit, on both sides. Nothing can be more clear to me, than that the husband meant to support his wife with sufficient liberality;—he had always done it;—for want of liberality is no where in the cause to be found imputable to him. However, the parties agreeing in substance, they disagree in terms; they disagree only in the nature of the security that was to be given for the allowance proposed. It is not my business to drop an opinion upon that subject; for, after what I have said, it will be sufficiently clear that it is not the business of this Court to approve at all of such separations. But, if I could with propriety for one moment abstract myself from the public situation which I am now in, and could stand in the situation of a private individual, and as the 53. + adviser of Mr. Evans, I should say, that the generous part would be the prudent part in such a business; and that a conduct of that nature would be that conduct, under all the circumstances, which it was most advisable to adopt:—however, with that I have nothing to do. The spirits of the parties are mutually irritated against each other; the treaty goes off upon that ground; and the refusal to adopt a particular mode of securing the allowance is to be construed a denial of all necessary support, and to be made the foundation of an accusation of cruelty.

10. + The truth of the case, according to the impression which the whole of it makes upon my mind, is this:—Two persons marry together; both

of good moral characters, but with something of warmth, and sensibility, in each of their tempers; the husband is occasionally inattentive; the wife has a vivacity that sometimes offends and sometimes is offended; something like unkindness is produced, and is then easily inflamed; the lady broods over petty resentments, which are anxiously fed by the busy X whispers of humble confidantes; her complaints, aggravated by their reports, are carried to her relations, and meet perhaps with a facility of reception, from their honest, but well-intentioned, minds. A state of mutual irritation increases; something like incivility is continually practising; and, where it is not practised, it is continually suspected; every word, every act, every look, has a meaning attached to it; it becomes a 352. contest of spirit, in form, between two persons eager to take, and not absolutely backward to give, mutual offence; at last the husband breaks up the family connection, and breaks it up with circumstances sufficiently expressive of disgust: treaties are attempted, and they miscarry, as they might be expected to do, in the hands of persons strongly disaffected towards each other; and then, for the very first time, as Dr. Arnold has observed, a suit of cruelty is thought of; a libel is given in, black with 316. criminating matter; recrimination comes from the other side; accusations rain heavy and thick on all sides, till all is involved in gloom, and the parties lose total sight of each other's real character, and of the truth of every one fact which is involved in the cause.

Out of this state of darkness and error it will not be easy for them to find their way. It were much to be wished that they could find it back again to domestic peace and happiness. "Mr. Evans has received a com-313. plete vindication of his character." Standing upon that ground, I trust X 310. he will act prudently and generously; for generosity is prudence in such circumstances. He will do well to remember, that the person he contends with is one over whom victory is painful; that she is one to whom he is bound by every tie that can fasten the heart of one human being to another; she is the partner of his bed!—the mother of his offspring! And, if mistakes have been committed, and grievous mistakes have been committed, most certainly, in this suit, she is still that person whose mistakes he is bound to cover, not only from his own notice, but, as far as he can, from that of every other person in the world.

Mrs. Evans has likewise something to forget; mistakes have been made to her disadvantage too in this business: she, I say, has something to forget. And I hope she has not to learn, that the dignity of a wife cannot be violated by submission to a husband.

It would be happy indeed, if, by a mutual sacrifice of resentments, peace could possibly be re-established. It requires, indeed, great efforts of generosity, great exertions of prudence, on their own part, and on the part of those who are connected with them. If this cannot be done; if the breach is too far widened ever to be closed, Mrs. Evans must find her way to relief; for, she must not continue upon her present footing, no, not for a moment: she must call in the intervention of prudent and respectable friends; and, if that is ineffectual, she must apply to the Court, under the guidance of her counsel, or other persons by whom the matrimonial law of this kingdom is understood.

But in taking this review, I rather digress from my province in giving advice: my province is merely to give judgment; to pronounce upon what I take to be the result of the facts laid before me. Considering, then, all those facts, with the most "conscientious care, and with the 353.

most conscientious application of my understanding to their result, I am of opinion, that Mr. Evans is exculpated from the charge of unmanly and unlawful cruelty. I therefore pronounce, that Mrs. Evans has failed in the proof of her libel, and dismiss Mr. Evans from all further observance of justice in this behalf.

LADY FERRERS v. LORD FERRERS.—p. 130.

Divorce—by reason of adultery, on the part of the wife—how *affected* by *delay* in instituting proceedings—by *alleged condonation*, &c.—Ultimately granted.

THIS was a question on the *admissibility* of a libel in a cause of divorce, instituted by the wife against the husband, by reason of adultery, on objections which are stated in the observations of the Court.

JUDGMENT.

Sir WILLIAM SCOTT.—The question before the Court arises on the admissibility of a libel, given in on the part of Lady Ferrers against her husband the Earl of Ferrers, in a suit of separation, by reason of adultery. The adverse Counsel have taken particular objections to separate articles, and also a general objection applicable to the whole. The Counsel, in support of the allegation, have given up the latter part of the fourth article, pleading a letter from Lord Ferrers, and the subsequent article exhibiting the letter,—the exhibit itself being in so mutilated and imperfect a state, as not to correspond with the recitement of it.

In objection to the sixth and ninth articles, which plead specific acts of adultery, prior to a connection which took place between them in 1784, it is said, that adultery should, at the utmost, in such a case, be pleaded generally; for the effect of condonation extinguishes the right of complaint, except for subsequent acts.—But Dr. Bever has very fully explained the effect of condonation by matrimonial intercourse. (a)—It is a conditional forgiveness, which does not take away the right of complaint, in case of a continuation of adultery, which operates as a reviver of former acts. The objection appears to be founded on a supposition, that the facts of adultery, pleaded subsequent to the condonation, would not be proved; in which case the proof of those facts, previous to the forgiveness, could not weigh.—But in debating an allegation, the facts laid are always supposed to be true. It was said, by Dr. Nicholl, that it resembled the case of *Bowes* and *Strathmore*, (b) where facts of adultery, previous to cohabitation, were not permitted to be pleaded. But there is an obvious distinction between the two cases, and in this respect,—that the husband there was not aggrieved, and the fact alleged against Lady Strathmore, if true, could be no injury to him. But is that the case here? In respect to any expense, which may be occasioned by it, in taking out a commission for the examination of witnesses in France, the Court must undoubtedly guard against unnecessary charges, but all circumstances must be fully stated, and the Court is bound to admit them to proof. To say there is suffi-

(a) On the same principle, *reconciliation* was pleadable, to a charge of elopement and adultery in bar of dower. *Lady Ann Powes v. Herbert*. Dyer's Rep. fol. 106.

(b) 3d March 1789, Deleg.

cient evidence without it, is saying nothing,—for you cannot narrow the adverse case in that way.

The seventh and eighth articles plead and exhibit a letter from Mrs. Nicholas, sister to Miss Munday, which is said to be a clear admission of *her* guilt by her nearest relation. It is objected, that if Mrs. Nicholas is not examined it is no evidence, and if she is, *it is unnecessary*. The first objection is well founded,—it is “*res inter alios acta*.” The admission of Miss Munday’s guilt by her sister, cannot affect Lord Ferrers, even if on oath, which it is not. I therefore reject that article and the exhibit.

The latter part of the fifteenth article pleads, that Lady Ferrers has been seen by Kirby, Jones, and others—and their declarations, “that she is not the person who cohabited with Lord Ferrers at their respective lodging-houses.”—But this is no evidence. They must be produced, or their unauthenticated declarations will be nugatory. This article must be reformed therefore by pleading, “that they are satisfied on their consciences, and verily believe, she is not the same person,” and on this they must be produced and examined.

The general objection is to the acquiescence of Lady Ferrers, from the year 1780, which is said to amount to condonation. It is contended, also, that she is barred by length of time; and that if a suit of this description was to come before the House of Lords, or before a jury, they would not sustain it. It is not my business to advert to what would be the conduct of the House of Lords, or of a court of common law. The House of Lords do not sit merely in a judicial capacity, tied down by certain rules, but as a legislative body, which has full power to act according to its own wisdom; so that their proceedings are not to be considered as mere forensic acts, but as acts of the legislature:—nor will the action at law, which is instituted, *diverso intuitu*, for the recovery of damages, apply to proceedings of this nature. It is not brought against the same person, but against the adulterer, for the injury sustained; and where the husband has not felt the injury, *no damages*, or, at least, nominal damages only, will be given. But in this Court it is not the measure of the injury which is to undergo consideration, but whether the party plaintiff is entitled to a separation or not? So that the courts of common law do not afford any conclusive rule which should bind this Court in a question of this kind.

The case of *Boteler v. Boteler*, Consist. (commenced in 1775, went on to 1777, *suspended till* 1788,) has been mentioned; but I see a material distinction in that case. An application was there made to the Court in favour of Mrs. Boteler, who had brought a suit against her husband for separation. Witnesses had been examined, and publication had passed. The suit then lay dormant for seven or eight years, during which time the original depositions were by some accident lost, and application was made to the Court to hear the cause on attested copies. The Court adverted to the special circumstances of the case, and placed the question on this ground, whether Mrs. Boteler was entitled to any special indulgence? and so placing it, thought that she was not, and therefore dismissed the suit. But if the original depositions had been existing, there is little doubt but that the Judge would have proceeded to hear the cause.

In the case of *Cibber v. Cibber*, Consist. 1739, there was an active concurrence in the husband to the guilt of the wife,—a state of fact very

different from a forbearance in bringing the suit, which may not only be excusable, but meritorious, in hopes of reconciliation; and, as was observed, there is a great difference between the husband and wife on this point. The husband may, by his authority, command the adherence and obedience of the wife; whereas the woman in case of elopement and criminality of the husband, must adopt some other mode than that of compulsion. The case of *Harris v. Ball*, Arches 1788, also, stood on a different ground. That was a case of impotency, pleading a species of defect not capable of proof. The circumstance of time was also an ingredient, but not the leading one in the case, that libel being dismissed as *felo de se* upon the other ground. No case has been cited to show that lapse of time alone is a sufficient bar.^(a) It is impossible for me to say that this suit might have been brought before consistently with prudence; and I will not lay it down as a rule, that a woman, not bringing her complaint immediately on the discovery, shall be afterwards barred from laying her case before the Court.

This cause went on, and was ultimately terminated 5th March 1791, by the judgment of the Court pronouncing for the divorce, as prayed on the part of Lady Ferrers.

(a) So in *Dodwell v. Dodwell*, 13th June 1789, the only act of adultery pleaded was in 1782, and it was objected that acts of adultery could not be given in evidence to obtain a divorce after five years. But the Court over-ruled the objection, observing that the objection as to time could not be maintained, as there was no limitation in suits of this nature. There had been a rule of the Canon Law "*adulter accusari non potest post quinquennium*," but that has been held to apply to criminal and not to civil suits. Sanchez, lib. x. desp. 3. § 9. Lex Julia Dig. lib. 48. tit. 5. sect. 29. p. 6. It appears, indeed, from Dr. *Bettenworth's* notes, to have been doubted at one time in civil suits. In the case of *Mule v. Mule*, 1710, before the Delegates, it was strongly contended that evidence of facts of adultery, which had passed more than six years, could not be read, but the objection was over-ruled, and the law is now settled otherwise.—Over-ruled.

In *D'Aguilar v. D'Aguilar*, 5th November 1793, [3 Eng. Eccl. Rep. 330.] the libel pleaded acts of cruelty in 1773; and an objection being taken to the libel on the ground of time. The Court observed—This is a suit brought by Lady D'Aguilar against the Baron, the parties being Jews, and married according to the Jewish rites: But the Court is under the same obligation to interfere and grant aid on violation of any duty arising out of such marriage, as well as any other. An objection is taken to the libel, that the facts are very ancient, and that they had been buried in silence for many years, and that it would be proper to exclude such complaint, by analogy to the statute of limitation. There might be more force in the objection, if it was not taken off by the subsequent conduct of the parties. If the wife had lived in the society of her husband, it might be improper to take notice of a complaint of such ancient date: But it appears that she was obliged to leave him, and lived separate till 1792. The effect of that separation, though not regular and formal, or under the authority of the Court, rebuts the inference of acquiescence, and affords a ground of presumption that her life had been rendered uncomfortable, and that she had been obliged to seek an asylum with her friends.—But there had been a condonation by a reconciliation in 1792—and it is said, that though this might be taken away by subsequent facts, they must not be slender facts, but such as would be sufficient to found a sentence. This is the true rule. But I think the facts pleaded are such as might avail substantively, and therefore that they may revive the ancient facts.—Libel admitted.

In *Mordaunt v. Mordaunt*, 1st June 1794.—On restitution of conjugal rights. The libel pleaded the marriage 27th February 1759; desertion of husband in April 1759: that he left Ireland and came to England, where he remained concealed from the wife till he was lately discovered, when being required to receive his wife, he refused. On objection to pleading desertion at such a distance of time, the Court said,—It knew of no limitation of time: There was none imposed by statute, or by any rule which the Court had laid down for itself. It was not in its power to refuse relief on that ground.—Libel admitted.

PERTREIS v. TONDEAR, falsely calling herself **PERTREIS**.—p. 136.

Marriage in the parish church, or some public chapel, required by 26 G. 3. c. 33. s. 1. *Exception*, as to the chapel of a Foreign Ambassador, between foreigners, *not* being of the Ambassador's country, *not* admitted. 558

NASH v. NASH.—p. 140.

Felonious acts, on what principles admitted, and under what limitation allowed to be pleaded in the Ecclesiastical Courts. 755

THIS was a cause of divorce by reason of adultery, brought by the husband against the wife. The parties had separated by agreement. The libel charged the woman with cohabiting in an adulterous intercourse, and also pleaded a *pretended* marriage with the adulterer; and exhibited a copy of the entry of such marriage. It was objected that this marriage being bigamy, and a felonious act, could not be pleaded in the Ecclesiastical Courts.

JUDGMENT.

Sir WILLIAM SCOTT.

In this libel, given in a case of adultery, an objection has been taken to an article which pleads a marriage between the party accused of adultery, and a certain person with whom she is pleaded to cohabit in an adulterous intercourse under the assumed character of wife, and to have so done for a considerable time; and it is said, that the crime of bigamy, being a felony, is improper to be pleaded before an Ecclesiastical Tribunal, where it is not triable; and many good cases have been cited by Dr. Lawrence tending to show that this Court cannot inquire criminally into cases, where it could otherwise inquire, if not cognizable at common law. Certainly this Court cannot inquire into a felony directly, even where a clergyman is sued for the purpose of deprivation. (a) And in a late determination of *Cummins v. Mayo*, Prerog. 28th April 1790, the allegation which was exceptive to witnesses, a species of plea upon which the Court always entertains some jealousy, charged a witness with felony in direct terms, and was properly on that ground rejected. But it is very frequent, and has so occurred in the course of practice, to admit a fact in itself criminal to be pleaded, as a necessary fact to the evidence in a civil suit. Such is the case in causes of nullity of marriage by reason of a former marriage. There was also a late case in the Arches, where the parties were married, and signed

2 C. 2. 32. (a) 12 Jan. 1.—“Scarle had been tried at common law and found guilty of manslaughter, whereupon he was questioned to deprivation before Doctor Bird, Judge of the Court of Audience, when he desired to be admitted to his defence, that he was not guilty, contrary to the verdict. Dr. Bird came to me for direction, and we agreed, that felony or other capital crimes were not examinable in the Ecclesiastical Courts; no, not for purposes that were examinable there, as in this case of deprivation; and therefore they may not originally examine such a crime to prove a *man criminous*, much less, when he is so proved in the proper Court, impeach the sentence in the proper Court. But they may build a sentence of deprivation upon such a conviction, and they are bound by it.” Hob. p. 121.—In the case of *Bromley v. Bromley*, Delegates, 1794. This form of pleading the conviction was adopted in proceedings for divorce by reason of sodomitical practices, of which the husband had been convicted. 60. 311.

the entry of marriage by fictitious names, which it is felony to do; 26 G. 2. c. 33. s. 16: yet that consideration was held not to bar the right of the party to proceed to a sentence of nullity in a civil suit, though it would, equally with the present case, have subjected the party to a prosecution by statute for the felony. There was another case of a person who had been guilty of altering a licence, which would have amounted to the crime of forgery. The marriage, in the present case, though amounting, if criminally prosecuted, to what the law describes as felony, will afford a strong presumption, and go in corroboration of the other evidence that may be offered as to the charge of adultery; for, if the parties have gone so far as to perform the ceremony of marriage in a church, and they have since lived together ostensibly as man and wife, that fact, so assisted by the subsequent cohabitation, is strong presumptive evidence of an adulterous intercourse, and will fix it. It is, therefore, proper to be pleaded. And as to the length of time which has elapsed without the husband having brought his suit, *that*, undoubtedly, comes under another consideration of the Court; but there is, as has been rightly observed, no legal limitation, and there may be reasons of discretion which may make him so far passive:—*that* has never been held to amount to a condonation;—which is effected by the return of the parties to live with each other; nor has a separation by articles or agreement ever been considered as a bar to a suit of this kind. (a) Another objection has been made to one of the articles, for want of sufficient specification in point of time,—it pleading “that some time in the course of the year;”—but, taken with the cohabitation which follows, I think it is admissible. If it shall be proved that the parties were married together, and lived in a state of habitual cohabitation, it is, in a case so composed, an averment sufficiently distinct, under the latitude which such circumstances give to a case of such a nature. (b)

(a) *Beeby v. Beeby*, 16th Nov. 1798. [3 Eng. Eccl. Rep. 338.]—In this case, being a cause of divorce by reason of the adultery of the wife, it was objected that the libel showed that the parties had lived in a state of separation, and that it was not competent to the husband to bring a suit of divorce, as he would not at common law be allowed to bring an action for damages. But the Court observed,—That separation is not considered by the Ecclesiastical Court as a bar to divorce for adultery, either previous or subsequent to the act alleged. It was not an answer to such a charge, even in cases of malicious desertion. But in cases of voluntary separation, it would be more unreasonable that the wife should be at liberty to impose a spurious issue on the husband. The Ecclesiastical Court* does not look on articles of separation with a favourable eye; but they are not held so odious as to be considered a bar to the charges of adultery.

In the case of *Woodcock v. Woodcock*, the act of adultery alleged, was committed during separation.

(b) Affirmed on appeal, 27th Jan. 1791.

* See the principles of the Courts of Common Law and of Equity on articles of separation, *St. John v. St. John*, 11 Vesey, p. 526. *Beard v. Webb*, 2 Bos. & Pul. p. 93. *Marshall v. Rutton*, 8 T. R. p. 545.

FORSTER v. FORSTER.—p. 144.

Recrimination, in a suit of divorce by reason of adultery, alleged in bar, &c.—Party dismissed.

THIS was a case of divorce, brought by the husband against the wife, by reason of adultery, in which recrimination, as pleaded in bar of the relief prayed by the husband, was much discussed in the observations of the Court.

JUDGMENT.

SIR WILLIAM SCOTT.

This is a very melancholy case, arising on a prosecution brought by the husband against the wife to be relieved from the obligation of cohabiting with her, by reason of her adultery.

The libel states the marriage between the parties in Jamaica, which is confessed, so that nothing arises on that part of the case.—For near ten years after, she had behaved in the most exemplary manner, fulfilling the duties of a wife and mother in a way that defied all reproach.—It is with great concern the Court sees a defection from virtue, which it must admit to be proved.—The libel charges facts of adultery, and states the history of a criminal connection, commenced at Lisle in 1787:—Witnesses have been examined, and it is, I repeat, with considerable concern that I am compelled to say, there is no doubt of the fact being proved by which the charge is supported.—The proof principally arises from the evidence of Sarah Walker, who was in attendance upon her at Lisle, and afterwards in England, and was privy to most of the transactions. It is proved by her in a manner to exclude all reasonable doubt, that there was an intimacy of an extraordinary nature between her mistress and a Mr. Mussell, that commenced at Lisle.—This witness is produced on both sides, and therefore not subject to impeachment from either. She proves a correspondence by letters from Canterbury, and a private meeting between the parties at Egham at night, clandestinely, and without the knowledge of the husband. An elopement takes place, and they are traced to different places in this town—particularly to the White Bear in Piccadilly—which is corroborated by Purser, the maid there, who knew Mussell personally, and proves his cohabiting there, at that time, with a female answering the description of Mrs. Forster. There are acknowledgments of the guilty connexion expressed in letters of her own writing, which are exhibited.—There is a verdict giving only a shilling damages, but which certainly affirms the proof of the fact by giving any damage at all. In short, there is a combination of proofs, which would make it a mere waste of time to observe minutely and particularly upon them.

The defence set up consists, first, of a denial of the facts, upon which it is unnecessary, after what I have just observed, to make a single remark—secondly, a species of justification arising from the similar misconduct of the husband, which certainly is not at all inconsistent with the plea of denial; for it is fairly open to the party to say in the same breath, "I have not committed adultery; but if I have, you have barred yourself from the remedy you pray, by your own misconduct of the same species, for though adultery cannot be justified in itself, it may be legally justified against you, by the proof that you have produced the evil of which you pretend to complain."—A third plea of defence offered, but with less effect, is, that his treatment of his wife was, as it really appears to have been, marked with unkindness and disaffection. I say with less effect, because if the course of unkindness was such as the law would notice, the remedy is not that to which she has unhappily resorted, but an application to this Court for the protection of a separation by

reason of cruelty: And if the ill treatment is not of that gross kind, against which the law would relieve in this form, still she is not to find her remedy in the contamination of her own mind and person, but in the purity of her own conduct, and in a dignified submission to an undeserved affliction. At the same time, though such a plea has no absolute effect, it has a very proper relative effect, where infidelity, on the part of the husband, is likewise charged; because it adds greatly to the probability that such a charge is well founded, if it appears that his affections were visibly estranged from his wife, and therefore more likely to be diverted to other less worthy objects." A fourth defence is, that he has connived at, encouraged and promoted his own dishonour; for, in that case, the general rule of law comes in, that *volenti non fit injuria*, no injury has been done, and therefore there is nothing to redress.

Having dismissed the first ground of defence, the denial of the fact; I proceed to the second, founded on an asserted principle of law, which withholds from a guilty husband the remedy against a guilty wife. Something has been said as if this ought not to be law: With that question I have nothing to do; for I must take the law as it is, and I shall therefore content myself upon that matter with observing, that it appears a good moral and social doctrine, which I have not the inclination, if I had the power, to innovate. It is unquestionably the rule of this Court. The principle is found in the Roman law:—" *Viro atque uxore invicem accusantibus, causam repudii dediisse utrumque pronuntiatum est: Id ita accipi debet, ut ea lege, quam ambo contempserunt, neuter vindicetur: paria enim delicta mutua pensatione dissolvuntur.*" Dig. 24. 3. 39. "*Judex adulteri ante oculos habere debet et inquirere, an maritus pudice vivens, mulieri quoque bonos mores colendi auctor fuerit. Periniquum enim videtur esse ut pudicitiam vir ab uxore exigat, quam ipse non exhibeat.*" Dig. 48. 5. 13. 5.

It could not be applied directly, in that system of law, to the immediate subject of divorce, because divorce being a matter altogether within the authority of the husband himself to dismiss his wife, the magistrate could have no power to apply any such principle to that transaction. But if the wife applied for dower, of which the magistrate had the cognizance, and the husband pleaded her adultery in bar of her demand, she had a right to object to the husband his own adulteries in bar of that objection. The magistrate then applied those principles which, expressed in the general terms in which they appear, must have governed the case of divorce itself, if the magistrate had possessed a jurisdiction that reached to that subject: For there is nothing that saves that subject from the reach of that principle of compensation, but that the subject itself is out of the reach of the magistrate. The canon law, therefore, which attributed to the Ecclesiastical Magistrate the jurisdiction of divorce, carried this principle (X. 5. 16. 7.) along with it for the exercise of his authority.

It appears from Gibert's *Jus Canonicum*, p. 121. § 4, that this rule of *compensatio criminum* was not received in France^(a), but it is undoubtedly received in England; and in the case of Lord and Lady Leicester, in 1737, was unanimously recognized by all the Delegates, as the standard canon law of this country in all cases of divorce; and so in

(a) This may be connected with the principle in the French law, "that adultery, committed by the husband, is not a ground of divorce or separation on the part of the wife." Pothier. vol. 3. p. 177.

all other cases. Where a wife is prosecuted criminally for adultery, not for divorce, but *ad publicam vindictam*, it can not be pleaded; for there the public, not the husband, is the injured party, and it can be no excuse for the wife's breach of the good order of society, that her husband had done so before her, whatever it might be in a mere civil prosecution instituted by himself(a). Taking the law, therefore, to be clear, I have only to examine how far the evidence supports the charge of the husband's criminality, with the satisfaction of knowing, that if it does, I am relieved from the necessity of inquiring minutely into the other pleas of defence.

This proof arises from the testimony of several women. First, Faris, who says, "That about nine years ago, she went to live with Mr. and Mrs. Forster, and that, in the morning of the third day after her arrival at their house at Egham, she went into a room, up one pair of stairs, to open the windows, supposing it was a spare room, and seeing the window curtains down, she drew them up, and proceeded to a bed in the room, and drew back the curtains, and was then surprised at seeing her master awake in bed; that he then immediately put his arm out of bed, and laid hold of her arm, and said something she does not now recollect, and looked her in the face, on which she begged his pardon, being flurried, and immediately left the room: That Mrs. Forster had not then arrived from Southampton, and that soon after Christmas, she was directed by Mrs. Forster to go to clean a house at Englefield Green, where they afterwards resided, which she did. It was a ready furnished house, but no person then resident in it, and Mrs. Forster, said, Mr. Forster said she must go there, and she went and slept there alone for about a fortnight; and about three o'clock in the afternoon of a Sunday, during that time, Mr. Forster came to the house alone, and the deponent went over the house with him, taking an account of the furniture; and that, in the last room they went into, no other person being in the said room, he tempted her, and said to her, 'Did not you come into the world for the use of men?' and she said to him, 'It was a sin; that he had a wife; that she was a poor girl, and what would become of her?' That he said, 'What is matrimony? a man with a black gown preaching before you, that is nothing; that he wondered such a girl could withstand such temptations;' and said, 'I hope you will consider of it.' To which she said, 'I hope you will.' And he then left her: That about a week afterwards she returned to Egham house, and about five days afterwards, he came into his dressing room, where she was cleaning the stove, and as she was going out of the room, he laid hold of her, and said, 'Have you considered?' to which she replied, 'Sir, if I have not considered, I hope you have,' and immediately left him. And afterwards, on the same day, up stairs, he asked her if she had no victuals in the house, and gave her two half guineas; and the witness being asked, agreeably to the contents of the allegation, whether he had carnal knowledge of her? says, she is ready to answer every thing fair, but such questions as that she does not choose to answer."

Taking the witness to have spoken true, it is a decisive proof of corrupt inclinations and endeavours on the part of Mr. Forster; and I see in it enough to induce me to infer, that there was no absolute want of

(a) So under the *Lex Julia* "*Quæ res potest et virum damnare, non rem ob compensationem mutui criminis inter utrosque communicare.*" Dig. L. 48. Tit. 5. 13. § 5.

infra corrupt inclination in her, and moral conviction would not hesitate to draw the conclusion, however legal reasoning might be compelled to pause.

The same witness goes on to say, "that about six years ago, she being then a married woman, with a child in her arms, met Mr. Forster, and told him, on his noticing her, that she heard he wanted somebody to clean the house, and she should be glad to come and do his work; and he appointed her at four o'clock the next day, when she went, and accompanied him to the different rooms, where he told her to follow him, and said he would tell her what she should do, and he turned down the bed-clothes, and desired her to mind all the beds, and particularly in the yellow room, where he gave her half a guinea." And the witness being again asked, "whether he had not then, and frequently, carnal knowledge of her?" replied as before, "that she does not choose to answer." He asked her, if she could recommend him to any body, she says she could not.

436. Thus stands the evidence of this witness, leading to a conclusion, which every man's private conviction must draw, even if it presented itself singly; but it derives confirmation strong, from proofs furnished *shals.*
363. by other females, on whom similar attempts have been made in a course of conduct familiar and habitual in this person.
11. 23.

Ann Slark, who is a nursery maid, says, "that about nine years ago, the family, who were all at Bath, went out, but Mr. Forster would not go with them, and he did not; but the witness being in the act of warming his bed at night, he came from an adjoining room undressed and in his shirt, and said he would kiss her, on which she screamed out and ran away." An attempt certainly of great indecency in the master and father of a family.

The next witness is Sarah Walker, who has been examined as well by the husband as by Mrs. Forster.—She says, "that on a day when her mistress was out, she being in her said mistress's bed-room, was desired by Mrs. Forster to go with him into a room up stairs to look at some curtains, in which room there were several spare beds, and she, not suspecting his intention, went, and after having opened and looked at some spare furniture, he took hold of her by the shoulders, and endeavoured to throw her down on the beds; that she struggled very much with him, and having also hurt his arms by pinching him, prevented his throwing her down; and, having disengaged herself, she said she would tell Mrs. Forster of his conduct, which he begged she would not, and promised never to take liberties with her again; and she says, she has no doubt it was his intention to have committed adultery with her, if he could have prevailed upon her."

Another young woman says, "that when she first went to live in his service, about two months after Mrs. Forster went to France, she took some water into his library to wash his feet; upon which he locked the door, and said he would not let her go, unless she would promise to let him into her bed-room at night; and when she had retired to her room, which she locked, heard him knock at the door, and he said, she had promised to admit him, to which she replied, that she did not mean it, and he continued at the door nearly half an hour: and afterwards at another time, he held out his hand to her with money, which she struck away, and beat out of his hand, saying, she neither wanted him or his money."

In these cases I am to understand that he failed in his endeavours; but failed from no want of purpose or activity on his own part, but from

an honest and powerful resistance on the other. These instances therefore furnish a strong corroboration to the conclusion to be drawn from the other case, where it is evident that no such resistance was to be apprehended, and where the conquest, by such arguments, and solicitations, and bribes, and his bodily force, all of which were used, must be presumed to be easy. But even if no such definitive presumption attached, I should be inclined to hold that the general conduct of the husband, as shown, is quite sufficient to support a plea in bar, though not sufficient to support an original accusation of adultery. For it is a principle that runs through a variety of cases, that many things are good for the one purpose, though deficient for the other. The husband, who enters the Court with a criminal imputation on the conduct of his wife, must purge his own conduct of all reasonable imputation of the same nature; and, if he complains of her impurities, must be untainted by any gross impurities of his own. It is a satisfaction to find this doctrine, in the case alluded to of Lord Leicester and Lady Leicester, laid down by the able person who then presided in the Court of Arches, the elder Dr. Bettesworth. In an accurate note of his judgment, I find it expressly laid down, "that where adultery was pleaded, by way of recrimination only, to bar, it was not necessary to prove such strong facts against the plaintiff, as would be required to convict the other party in a suit for divorce; for, to obtain a sentence of divorce, the husband must have a pure character." 362. 6H. 59. 3^d 306. 5th. 440.

Let me apply this observation to the present case. Here is a woman for ten years acting irreproachably; exemplary in her conduct as a wife and a mother, and who, after gross neglect and gross provocation on the part of the husband, falls at last a victim to the arts of a seducer. In the mean time, what has been the behaviour of the husband? Planting corruption most sedulously all around him,—soliciting the chastity of his female servants, by every art of profligacy that he could apply,—converting his own house into a brothel, and even engaging these females in the employment of finding for him other objects of his criminal gratifications. Surely this is not the man who can call out, in a court of justice, against the unfortunate delinquency of his wife: He cannot be listened to on any such complaint. 253.

After what I have said upon this point, it is unnecessary for me to travel much into other parts of the case. Upon his general treatment of his wife, I will content myself with stating the deposition of Mr. Stephenson, a man at a grave time of life, in a grave profession, being the medical attendant on the family, and having nothing to prevent him from making his observations in the most dispassionate manner. His account is this, "That she was a very pleasing and agreeable woman, and, as far as he ever saw or observed, always behaved with as great propriety and tenderness towards her husband and children, as a man would wish to see;—that Mr. Forster treated her with great indifference and inattention, not to be expected by a young handsome woman, as Mrs. Forster was, every way qualified to make an agreeable companion to a man who treated her with affection;—that, in 1785, he learnt, in consequence of a question he necessarily put to Mrs. Forster, that Mr. Forster had withdrawn himself from her bed, at which time she appeared to him to behave with great propriety; and he knows of no cause or provocation for his so withdrawing himself." 257. X X

Most certainly, what Dr. Harris has said is true, "that the duty of matrimonial intercourse" cannot be compelled by this Court, though ma- 349.

49. trimonial cohabitation may." This species of malicious desertion is a ground of divorce in some countries,—certainly not so *here*,—and still less will it justify a wife, in a resort to unlawful pleasures, that lawful ones are withdrawn. It is not however to be considered as a matter perfectly light in the behavior of a complaining husband, that he has withdrawn himself without cause, and without consent, from the discharge of duties that belong to the very institution of marriage; and if he has so done, he ought to feel less surprise, if consequences of human infirmity should ensue.

63. H. 259. I have to observe likewise, that his marital conduct is, in the present instance, in the highest degree *inofficious*. A husband is expected by the law to pay a due attention to the behaviour of his wife, and to give her the benefit of some superintendence, where she is placed in dangerous situations. He sends her to Lisle, a French garrison town, amongst French officers living with the known profligacy of that profession in that country, and the resort of dissolute persons both of our own and other countries. He had a confidence, it is said, in the discretion of friends, whom he placed about her; and of those friends, Mr. Mussell, who was one, does not appear to be entitled to any high panegyric on account of *his* attention to her conduct. This clearly appears from her own letters, that she was the object of criminal pursuits. Mr. Forster is made acquainted with the amorous billets which she had received from the *Monsieurs*, as they are called. One of her letters speaks of an attack almost by force; still Mr. Forster does not think it necessary to repair to her, but lingers two months in England, though such attempts of French gallantry upon his wife had become matters of general conversation, and even of general merriment, in which he was not indisposed to join unreservedly. It would lead to a suspicion that events, which have unfortunately been produced, were the very events intended to be produced. At any rate, there is a want of that delicate sensibility, of that prudent attention, of that honest caution, which belong to the character of a husband. A Court of Justice is not the first place in which that sensibility should be shown.

545. The verdict has been little alluded to; and I only observe, the rate of damages given by the Court cannot be accounted for, on the common grounds on which very small damages are sometimes given: They are given here for the stigmatizing purpose—to establish the fact, but to establish the fact to be no injury to the individual who presumes to complain of it.

The case will probably travel to places where it will receive decisions from superior authorities, possessing superior lights. It is my duty to form my present judgment upon my own view of the case, and certainly not without an anticipation, that the same view will be entertained of it by all who may have occasion to consider it hereafter. If I am mistaken in that, it will become my duty to conclude that I have formed an erroneous judgment upon its real merits. But I have the satisfaction of thinking that I pronounce at least an honest judgment, in declaring, that this party had no right to institute this suit, and that his wife is dismissed from all further attendance in this Court.

In this case an appeal was prosecuted to the Court of Arches, in which two further allegations were admitted on the part of the husband. An appeal was afterwards interposed on the part of the wife from an

interlocutory order of that Court, to the Court of Delegates, in which a further allegation on her part was admitted. On the final hearing, 6th July 1797, the wife was dismissed from the original citation, and all further observance of justice.

The DUKE of PORTLAND v. BINGHAM.—p. 157.

Licence to preach in Quebec chapel in Mary-le-bone, not allowed to be impeached, by proceedings on the part of the Impropiator, in a civil suit—he not showing an interest that would entitle him to maintain such a suit.

The Office of the Judge promoted by

HUTCHINS v. DENZILOE and LOVELAND.—p. 170.

Proceedings against a Churchwarden, for interfering to obstruct and prohibit the form of singing, &c. which had been authorized by the Minister, sustained.

Question of practice.—Whether on a citation to appear on a day fixed, and receive *articles*, &c. the person is entitled to demand that the articles shall be delivered on the first Court-day, or that otherwise he should be dismissed.—Not so held.

The Office of the Judge promoted by

HUTCHINGS v. DENZILOE.—p. 181.

Proceedings under the stat. 5, 6 Edw. 6. ch. 4. s. 1. [for *quarrelling, chiding, or brawling*,] must be supported by *two* witnesses on the specific charge.—Dismissed.

PRITCHARD v. DALBY.—p. 186.

Misnomer—how considered.—Averment of the party, as to his true name, required, and binding on him.

THIS was a question of practice, as to the effect of a misnomer, and the effect of the averment of the party, as to his *true name*.

In this case, a citation had issued against Sarah Dalby, in a suit of defamation, on which an appearance was given under protest, alleging her true name to be Dolby. The usual assignation was made, that the objection should be argued, on petition of both Proctors, the following Court. But, on the next Court-day, after the cause had been further continued, during the sitting of the Court, the Proctor for Mrs. Dalby alleged the name of the person cited to be Sarah Austin, and prayed to be dismissed. In reply to this averment, it was argued, that on an objection of misnomer, the party must plead the true name, and will be held by that allegation; and cases were cited, in which that rule had been held strictly at common law. (a) On the other side it was said, that the Court would relieve the party from the mistake of his Proctor, in any

(a) The Queen v. Stedman, 2d Lord Raymond, p. 1307.

stage of the proceedings, and that she was at liberty to vary the protest, till it came before the Court for decision, as the party could only be bound by actual appearance.

JUDGMENT.

SIR WILLIAM SCOTT.

In my opinion this protest cannot be sustained. It is within the recollection of the Court, that, on the first allegation of misnomer, it had intimated that it was not a material variation, but apparently the same name; it however allowed the objection to be argued on petition. It is now alleged that the true name is Sarah Austin; but whoever alleges a misnomer is bound to assign the true name by which he means to abide, and against which he shall not be at liberty to aver, for, without such a limitation, the other party might be carried on for ever.

When a person appears, it may morally justify the presumption that he is the party intended; the law, however, allows the benefit of the exception, as to the validity of the citation, but under the condition before mentioned. The material question is, how the mistake originated: Upon that question, the Court must presume that the Proctor would not make that averment without authority; it must therefore be considered to be the act of the party. It may be true, that a Proctor may introduce new matter on his protest, but not such as is inconsistent with a former allegation. I think, therefore, that the attempt, which has been made to delay these proceedings, on this last objection, is improper, and that the protest must be over-ruled.

GROVES and WRIGHT v. The RECTOR, PARISHIONERS, and INHABITANTS of HORNSEY, &c. &c.—p. 188.

Faculty for erecting a gallery, for the accommodation of the increased population of the parish, granted.—Objections on the part of certain parishioners over-ruled.

The CHURCHWARDENS of Saint JOHN'S, MARGATE, v. The PARISHIONERS, VICAR, and INHABITANTS of the Same.—p. 198.

Faculty for accepting and erecting an Organ, offered to Parish Church of St. John's, Margate,—granted, without clause against future expenses being charged to the Parish. Objection, on the part of certain Parishioners, over-ruled.

The Office of the Judge promoted by

MAIDMAN v. MALPAS.—p. 205.

Proceedings promoted by the Rector of the Parish, against a person for erecting a monument in the Church without a Faculty.—Sustained.

BOWZER, as Guardian of his SON, v. RICKETTS, falsely calling herself BOWZER.—p. 213.

In nullity of marriage by reason of minority, at the suit of the Father, a prayer, on the part of the wife, "that the Minor, now of age, might be called to declare, whether he would carry on the suit, or that otherwise she might be dismissed."—Not sustained.

412-14. LINDO, by her Guardian, v. BELISARIO.—p. 216. 557.

E.L. & R. Validity of Jewish Marriage, tried by evidence of the Laws of the Jews, as in cases of Foreign Marriage.—The asserted Marriage held invalid.

THIS was a case of jactitation of marriage, brought for the purpose of trying the validity of a marriage, according to the Jewish rites; instituted by the wife against the asserted husband.

JUDGMENT.

SIR WILLIAM SCOTT.

This is a case which comes before this Court by the direction of the Lord Chancellor. Under the sanction of that high authority I shall certainly apply myself closely to the investigation of the question, though otherwise I should have entertained considerable doubt, if not on the jurisdiction itself, at least upon the propriety of exercising it in this case. The Ecclesiastical Court has an undoubted jurisdiction upon the general law of marriage, so far as the legality of that contract is constituted by the law of this country. It also examines questions of foreign marriages, in cases of British subjects, and sometimes of aliens; and it does this from necessity, in order to prevent a failure of justice; and with the satisfaction of knowing, that the principles, which regulate English marriages, are such as are also generally applicable to marriages of foreign Christian countries; the marriage law of Europe being founded on the same general principles, and having for its basis the ancient canon law; so that there is not much danger that the Court can proceed wrongly on such general principles, and on such a basis. This is a question of marriage of a very different kind—between persons governed by a peculiar law of their own, and administered, to a certain degree, by a (a) juris-

(a) On the state of the Jews in this country, see Selden, 3d vol. p. 1459. Molloy, lib. 3. ch. 6. 1 Atkyns, p. 41. and a pamphlet, "Whether a Jew might hold lands," A. D. 1753, &c. They appear to have been brought here in considerable numbers by William I. from Rouen, 1070. They were considered as merchant strangers, and were allowed to have *medietatem linguae Judaeorum*, 1 Edw. 1. Selden, 3d vol. p. 1460. They had also the power of *excommunicating* their own members.—Special Justices were appointed "*ad custodiam Judaeorum*," whose decisions, in certain cases, were *secundum legem et consuetudinem Judaismi*. Selden, ib. Molloy, ib. They lived as bondmen of the kings, and under special protection, regulations, and exemptions, till they were banished, 31st August 1290. They did not appear again in this kingdom as a distinct body till the time of Charles II. They had petitioned in 1684 to be allowed to return and enjoy their religion (a); and the question was much agitated, but nothing was done. On the Restoration, Charles II. promised them protection and the use of their religion, and an Order of Council issued to that effect. (b)

Many Jews obtained Letters of Denization during that reign. They were not (as it is believed) mentioned in the exceptions in the Marriage Acts as projected in the reign of

(a) See Appendix, No. 1.

(b) See Appendix, No. 2.

diction established among themselves—a jurisdiction competent to decide upon questions of this nature with peculiar advantage; and with sufficient authority. It would, therefore, have been a matter of grave consideration with me, if the question had been brought in the ordinary way, and without any such recommendation;—whether it would not have been referred more conveniently to that tribunal to which I have alluded; for I cannot but be sensible, that in applying the general principles of the law of marriage to this case, I may be adopting rules that are not duly founded, and which may prove highly inexpedient. On the other hand, if I am to apply the peculiar principles of the Jewish law, which I conceive is the obligation imposed upon me, I may run the hazard of mistaking those principles, having a very moderate knowledge of that law. I feel also the weight of the consideration, that a decision on the present question may affect a very numerous and respectable body of people. Under this responsibility I repeat that nothing but my respect for the high authority which has prescribed this duty, would have induced me willingly to undertake it. Being, however, under the necessity of addressing myself to it, I shall take care to use every caution respecting the means of information, and the manner of applying it, that my judgment can suggest: Under these observations I proceed to consider the particular question that is thus brought before me.

A libel has been given charging “that Mr. Belisario has boasted of a marriage which is not good and valid in law.” He has admitted the fact of jactitation, and, at the same time he asserts, as he has a right to do, the factum of the marriage, and its validity. The factum of marriage, I presume, was not the principal subject of reference, from the high authority to which I have alluded; for, if that had been the question, it would have been referred probably to another mode of inquiry, on an issue directed to a jury, who would have been more capable of examining it than this Court. However, the factum comes before me; and I cannot help observing, that this part of the question has been rather singularly introduced. The libel stated the jactitation. An allegation was then given in, on the part of the defendant, stating the general law of the Jews, and asserting the factum of marriage agreeably to it, on which he relied, as being a complete marriage. In answer to that, another allegation has been given in on the part of Miss Lindo, reciting what had been stated to be the law, and denying that such ceremony does constitute marriage, “*but only a betrothing.*”—It proceeds in the second article to recite the factum, as alleged in the fourteenth article of the husband’s plea, which is agreeable to the ceremony as before described, and denies that it did even constitute “a complete *betrothment.*”

It appeared inconsistent, I own, that the first article of the responsive allegation should admit the ceremony of giving the ring in the presence of witnesses, and accompanied with certain words, to be a betrothment; and that the second article, which recites the same ceremony as having actually passed between the parties, should allege that it did not constitute a betrothment. There followed another allegation which the Court

William III. though Quakers are: but they were included in the same exception in the Act 26 G. 2. ch. 33. Their state and condition having recently become an object of public attention on the discussion of the Act 26 G. 2. ch. 26. for the Naturalization of Jews, which passed in 1753, but was repealed in 27 G. 2. ch. 1. 1754.

did not admit, because it appeared to offer no new information; and though it may be singular to notice what has been rejected by the Court, yet, as it comes out on the interrogatories, and in a case of this special nature, which calls for particular attention to all its parts, I may be permitted to make some observations upon it.

That allegation stated, that there was a tribunal among the Jews, composed of an Archisynagogus and Assessors,—persons of competent learning and abilities to decide their matrimonial questions; that they had called the parties before them, and, on deliberate examination, pronounced the ceremony in question to be a doubtful betrothment; and that the asserted married woman, in this case, was a doubtful betrothed. I do not mean to impeach that sentence; but, according to our notions, it is not very intelligible, as expressed. Judges ought certainly to come, with minds open to all doubts, to the consideration of a question; in other words, they must not yield to hasty impressions, but they must ultimately decide those doubts; since it is the business of judges to send into the world, not doubts, but decisions; and they must make up their minds on one side or the other, on the balance of the evidence that is before them. The only way, in which I could reconcile this result of their deliberation, to any mode of proceeding familiar to us, would be to compare it to what might be a sentence of failure of proof, in our Ecclesiastical Courts, in a matrimonial cause. In which case, we well know, that such decision would not be definitive, according to the rule of the canon law, "*non transit sententia in rem judicatam contra matrimonium*;" X. 2. 27. 7; but the party might give supplemental proof, and so establish the marriage in subsequent proceedings. But if the law is otherwise amongst the Jews, as I have understood, this cannot be done; and I cannot think that this mode of pleading this sentence has been the most proper, because it should have been alleged, that when the judges had given a decision of doubtful betrothment, it was, in fact, a definitive judgment against the validity of that betrothment. If it had been so pleaded, this Court might have acted upon it, and have thought itself precluded from entering into any further examination of the marriage. But without some such conclusive declaration, in the ordinary acceptance of the words, and without the assistance of any technical interpretation, the circumstance that it appeared doubtful to them, was a strong reason why this Court should proceed in the investigation of it. This Court, therefore, cannot consider the report of that tribunal, even if it was directly before it, as any bar to the present enquiry into the matter of fact, whether that, which they held to be doubtful, is a certain and existing fact or not. Having considered that subject, I must say, that I do not entertain doubts upon it.

It appears on the interrogatories, that the doubts, which were entertained by that tribunal, were founded on this,—that one of the witnesses could not distinguish which of the two young women present, was the person supposed to have been married by the ceremony described. A doubt was raised as to the identity; but, on the present evidence, there is no room for entertaining any doubt on that point: It had been pleaded in the allegation, that the man paid his addresses to the lady promoting this suit, and she admits that she is the party.

If there is no peculiar rule in the Jewish law, that a marriage cannot be established in point of fact, if one of the witnesses had a doubt about the identity, (and I cannot suppose there is such a rule as it has not been

pleaded), I am certainly not concluded by that sentence; and, upon the present evidence, I find it impossible to entertain a particle of doubt; that a factum has really passed between these two parties. That factum, which, according to one statement, constitutes a marriage, but according to the other, only a betrothment. Upon the factum no doubt remains; and the only question that presents itself for decision is, which of the two descriptions, betrothment or marriage, is entitled to be considered as the true legal character, which belongs to it.

In proceeding to consider this question, it will of course be necessary to remove all circumstances that do not essentially belong to it; and I shall immediately exclude all imputation of fraud, because no such imputation is supported by the evidence. In the allegation, the Court permitted several circumstances to be pleaded, because it was not then known what effect the peculiar law of the Jews might give to those circumstances, —such as disparity of age, and of fortune, and the clandestinity of the engagement. But it does not appear that all the circumstances of this case as proved, taken together, can be held to compose a case, which I can judicially consider as a case of fraud. Such disparity of age, as exists in the present case, is by no means uncommon, and disparity of fortune is by no means demonstrative of fraud. I observe likewise there is no marked disparity between the families. As to the private manner in which the communication was carried on, it is a sort of artifice so much used, in the common habits of mankind, in similar cases, that if I was to hold that to be material enough to invalidate a marriage, I might unhinge no small number of marriages in the kingdom. This objection is the less to be regarded in this case, because it does not appear that, by the laws of the Jews, the consent of the family is absolutely necessary, and therefore privacy is of the less importance.

I shall next dismiss from the case every imputation of force; for there appears to have been as perfect a correspondence and concurrence of inclination as possible. The letters, which have been exhibited, breathe the warmest sentiments of affection on her part; and though she is said to be a very young person, she is, by the laws of the kingdom, as well as by the Jewish law, supposed capable of protecting herself against imposition and force, and competent to enter into any matrimonial engagement. In the letters written after the ceremony she declares herself to be his wife; and I observe, in the petition to the Lord Chancellor, the Guardians represent their fears that a marriage will very soon take place, unless the authority of that Court is interposed to prevent it. She was removed under the care of her brother for that purpose, and since she has been placed under the protection of the Court of Chancery, access has been denied to the asserted husband only by external authority; and there is no evidence of any force being attempted upon her: This Court therefore considers the question simply as a question of law on the validity of the marriage, abstracting all suggestion of force or fraud in the person against whom this proceeding is instituted.

The factum of marriage is described in the allegation, and has undergone so much discussion, that it is, perhaps, unnecessary to advert to it. The allegation, after pleading the letters, goes on to describe the factum of the ceremony to this effect: "That before sunset, and between eleven and twelve o'clock in the morning of Friday the 26th day of July 1793, Esther Mendes Belisario, then Lindo, thereby meaning Esther Lindo, spinster, the minor in this cause, went to and met Aaron Mendes Be-

lisario, the other party in this cause, at the house of his brother, Jacob Mendes Belisario, in Little Bennet Street, for the performance of their marriage, and Abraham Jacobs and Lyon Cohen, two credible persons of the Jewish nation, attended at the said house to be present at the ceremony thereof; that the said Aaron Mendes Belisario, then in the presence of the said Abraham Jacobs and Lyon Cohen, addressed himself to the said Esther Mendes Belisario, then Lindo, thereby meaning the said Esther Lindo, spinster, the minor aforesaid, in the words or to the effect following: 'Do you know, that by taking this ring, (meaning a ring which he then produced to her), you become my wife?' to which she answered, 'I do.' That he then said to her, 'Do you take this ring freely, voluntarily, and without force?' to which she answered, 'I do;' or they, the said Aaron Mendes Belisario, and Esther Mendes Belisario, then expressed themselves in words to that very effect; and the said Aaron Mendes Belisario immediately thereupon, in the presence of the persons aforesaid, delivered to and placed upon the fore-finger of the left hand of the said Esther Mendes Belisario, which she tendered to him for that purpose, and freely and voluntarily accepted and received the said ring, and at the same time repeated to her certain words in the Hebrew language."

That is the ceremony which is described to have passed, and is proved to have passed between these persons. It comes then more to a question of law. On one side it is asserted that this is a complete marriage,—on the other side, it is alleged that it is not a marriage, but only a betrothment; and they proceed to state that, which, if true, is decisive of the whole question, that the ceremony essential to constitute effectual and complete matrimony is as follows:—"That a formal contract in the Hebrew language must be entered into by the bridegroom with the bride, according to the formalities and rules of the Congregation; and such contract must be drawn up by the Priest, and be signed by the bridegroom; be entered and registered in a certain book kept for that purpose by the Priest, and the entry must be signed by the bridegroom and other two witnesses, which being done, the original contract is delivered to the bride." This being pleaded to be the ceremony which constitutes an essential and valid marriage, it would follow, that, as nothing of that kind has passed, there is an end of this pretended marriage entirely, if the law is proved to be conformable to this description of it.

In order to establish that proposition, three persons are produced, who compose the judicial synod, called the Bethdin. Some observations have been made upon the character of those persons, but without apparent foundation; and I am inclined to treat them with the respect due to their situations. I must, however, examine in what manner the proposition, which is advanced as the main issue of this cause, is proved; and I think I do not depart from that civility which I am inclined to show them, when I presume to think, that, from not perfectly understanding the form of words in the English language, or from other causes of that kind, there appears some little inconsistency in their depositions.

The first person is Mr. Julian, who expresses himself nearly in the terms of the allegation: he says, "that the ceremony essential to, and which constitutes an effectual valid and legal marriage among the Jews, is,—that a formal contract, in the Hebrew language, must be entered into by the bridegroom with the bride, according to the rites and cere-

monies of the Jews, and the rules of the Jewish congregation, to which the parties belong, which is drawn up by the priest or minister who marries them, and must be signed by the bridegroom and two witnesses before the ceremony of marriage, and must also be entered and registered in a certain book kept for that purpose in the synagogue, or by the priest or minister of such congregation."

According to this opinion, if it stopped here, the position would be perfectly correct in point of law; but, in the very next sentence, I find what appears to me to be rather inconsistent; for it goes on to say, "that if a Jew and Jewess having given and received the Kedushim, the Jew was to say, in the presence of two witnesses respectively Jews, that he was going to have connection with such Jewess, in the name of marriage, and then retired and had such knowledge of her, it would be a good and lawful marriage between such persons, according to the Jewish law, and would be so pronounced to be by the Bethdin." Every one must perceive that this is inconsistent with what had been said before; because it cannot be essential to the validity of the marriage, that the ceremonies described above should have passed, when it is in the next sentence declared, that without several of these ceremonies, a legal, valid, and effectual marriage may take place, to all intents and purposes.

The next witness is Mr. Almosnino; and he appears to be rather more familiarly acquainted with the force and meaning of English terms; since, in the original deposition, the word *essential* is corrected and altered for the word *customary*; and all that he ventures to say is, that the *customary* ceremony is that described in the allegation.

Mr. Delgado, the third witness, introduces this distinction. He says, "that the ceremony required by the Mosaical law is as follows:" He then describes it, and adds, "It is not required by the law of Moses that there should be a written contract; for though it is required by the Rabbinical law, it is not *essential*; and if a Jew and Jewess were to declare that they were going to retire, for the purpose above described by the other witness, and were so to retire, the same would be a good and valid marriage, although no ceremony is performed, and no contract entered into." Then I think we have established, so far at least, that the written contract is not essential; we have it completely so proved by witnesses, who are referred to as above all exception, and who speak not only with knowledge, but with authority, on this subject. What I infer from it is, that there exists among the Jews, as in many other communities and societies, a distinction between marriages *solemn* and *unsolemn*; that there are marriages which have certain solemnities attached to them, for the purposes of public notification, and for the complete satisfaction of the civil and ecclesiastical law, although not necessary for the purpose of validity.

There is also a particular exhibit introduced, to which the Court is inclined to pay great respect and attention; being a certificate signed by a person who was himself Archisynagogus, and by two assessors, in which the opinion of these persons is delivered corresponding with that expressed by the witnesses, but given by them on a case long prior to the present. That certificate states a case of facts like the present, and declares the marriage to be valid. For they say, "In conformity to your orders given to us, in virtue of the memorial presented to you by Mr. Benjamin Mendes Henriques, wherein he requested that the contract of marriage shown to us, bearing date the 24th April, in the year

1776, should be examined by us, that we might determine whether the said marriage is valid according to our holy law, and whether the children born from the said matrimony are held as legitimate or spurious? We say, that the said contract contains a narrative of the Kedushim, which the said requirant, Benjamin Mendes Henriques, had given, in presence of two witnesses, unto Rabbia de Matta Henriques, with a gold ring, saying the usual words; at the same time he put the ring on her finger, and the witnesses declared that the said Benjamin Mendes Henriques and Rabbia de Matta Henriques, in their presence, said, that they made this act of espousal of their free and mutual consent, without force or compulsion, and the said parties signed that declaration in presence of the said witnesses, who likewise signed the narrative of the fact."

Now, on this authority, those persons pronounce this marriage to be valid, and that the woman is prohibited from marrying again with any other person, notwithstanding other contracts of marriage before or after the Kedushim, unless after legal divorce, and that children born under that marriage are legitimate, &c. But they go on to observe: "But inasmuch as there did not follow to the Kedushim the nuptial benediction, which, without exception, all Israel used; and also as the said Benjamin Mendes Henriques did not make unto his wife a Ketuba or marriage contract, ordained and established by the law of Moses, it is certain that they are living in *venial* sin, but not *criminal*." It is clear, I think, that there was not a Ketuba, nor the sacred benedictions and blessings, yet the marriage was held to be good and valid.

The addition that the parties are living in sin *venially* but not *criminally*, has been pushed too far in argument, when it is contended that the parties would not have the lawful use of each other's persons in the way of marriage; for, I conceive, it only means that they were offending against the orders of the Church,—that it was an irregularity similar to what is known to have existed in the books of the canon law, where it is held that marriages, though clandestine and irregular, are nevertheless valid. It is a distinction very familiar to the readers of the books of the Canonists, that practices and acts, frowned upon by the Church as irregular, and, on that account, partaking of the nature of sins and offences, are nevertheless not so mortal or deadly, as not to be venial, and to have their sinful character totally removed, by subsequent conformity to the public regulations. The sin they commit is against public order, but will have no effect on the validity of the marriage: and it is to be inferred that these parties, in the performance of the personal duties of marriage towards each other, are not doing any thing which is thought inconsistent, to any further effect, with the laws of marriage.—The inquiry then is narrowed to this question, whether what was done in the present case was sufficient or not? It being proved, that the whole of what is stated in the allegation to be essential and necessary, is not essential and necessary. Was then enough done in this case? Before I examine that point, I will venture to say a few words on the nature of the marriage contract.

The opinions which have divided the world, or writers at least, on this subject, are, generally, two. It is held by some persons that marriage is a contract merely civil—by others, that it is a sacred, religious, and spiritual contract, and only so to be considered. The jurisdiction of the Ecclesiastical Court was founded on ideas of this last described nature; but in a more correct view of this subject, I conceive that nei-

ther of these opinions is perfectly accurate. According to juster notions of the nature of the marriage contract, it is not *merely* either a civil or religious contract; and, at the present time, it is not to be considered as originally and simply one or the other. It is a contract according to the law of nature, antecedent to civil institution, and which may take place to all intents and purposes, wherever two persons of different sexes engage, by mutual contracts, to live together. Our first parents lived not in political society, but as individuals, without the regulation of any institutions of that kind. It is hardly necessary to enter something of a protest against the opinion, if any such opinion exists, that a mere commerce between the sexes is itself marriage. A marriage is not every casual commerce; nor would it be so even in the law of nature. A mere casual commerce, without the intention of cohabitation, and bringing up of children, would not constitute marriage under any supposition. But when two persons agree to have that commerce for the procreation and bringing up of children, and for such lasting cohabitation,—that, in a state of nature, would be a marriage, and in the absence of all civil and religious institutes, might safely be presumed to be, as it is popularly called, a *marriage in the sight of God*.

It has been made a question how long the cohabitation must continue by the law of nature, whether to the end of life?—Without pursuing that discussion, it is enough to say that it cannot be a mere casual and temporary commerce, but must be a contract at least extending to such purposes, of a more permanent nature, in the intention of the parties.—The contract, thus formed in the state of nature, is adopted as a contract of the greatest importance in civil institutions, and it is charged with a vast variety of obligations merely civil. Rights of property are attached to it, on very different principles, in different countries. In some, there is a *communio bonorum*. In some, each retain their separate property. By our law it is vested in the husband. Marriage may be good independent of any considerations of property, and the *vinculum fidei* may well subsist without them.

In most countries it is also clothed with religious rites, even in rude societies, (a) as well as in those which are more distinguished for their civil and religious institutions. But in many of those societies, as I have had occasion to observe, they may be irregular, informal, and discountenanced on that account,—yet not invalidated. Scotch marriages have been mentioned.—The rule prevailed in all times, as the rule of the canon law, which existed in this country and in Scotland, till other civil regulations interfered in this country; and it is the rule which prevails in many countries of the world, at this day, that a mutual engagement, or *betrothment*, is a good marriage, without consummation, according to the law of nature, and binds the parties accordingly, as the terms of other contracts would do, respecting the engagements which they purport to describe. If they agree, and pledge their troth to resign to each other the use of their persons, for the purpose of raising a common offspring, by the law of nature that is complete. It is not necessary that actual use and possession should have intervened to complete the *vinculum fidei*. The *vinculum* follows on the contract, without consummation, if expressed in present terms; and the canon law itself, with all its attachments to

(a) Hockmannus de Benedictione Nuptiarum, c. 2. s. 3. “Non minor fuit Pagano-
rum circa conjugia religio.”

ecclesiastical forms, adopts this view of the subject, as is well described by Swinburne in his book on *Espousals*, where he says "that it is a present and perfect consent, the which alone maketh matrimony, without either public solemnization, or carnal copulation, for neither is the one nor the other, the essence of matrimony, but consent only." (s. 4.)

Now the ceremony which is described to have passed in the present case, would certainly be a complete marriage by the law of nature; for, besides verbal declarations, made in the presence of two witnesses, there is the delivery of the ring—a form which has found its way into the marriage ceremonies of most countries; and it is the very symbol of marriage, and the particular act, in our country, that gives a character to the whole ceremony; since we say "with this ring I thee wed." There being then this ceremony, which is more than enough by the law of nature, the question is reduced to this, whether the institutions of the Jews hold it to be insufficient? It has been said truly that the law of Moses stands very much on the law of nature; for that it has not prescribed any formal ceremony of marriage. It is clear, however, that there are legal institutions to which the Jews adhere in practice, and which I must consider as having the force and effect of laws, materially bearing upon the present question, and those are the laws derived from the institutions of the Rabbies.

Now it appears that, under those institutions, a distinction exists between *betrothment* and *marriage*; nearly the same as between the *sponsalia* and *nuptiæ* in the Christian canon law; and that the ceremony, alleged to have passed in this case, is called the betrothment, and not the marriage. A distinction, however, of that sort will not decide the question, because it may be little more than nominal, and not of substance; and it does not follow that because there is such a distinction in terms, it may not possess the very essence of matrimony. The opinion of the learned men who have said "that it is only a betrothment," will not decide the question negatively; and I must, in order to find out its real character, look to the effect produced on the parties by this act of betrothing, and from thence I must judge, as well as I can, in what degree it has the essential features and character of real matrimony.

I have already stated the difference of opinion, in the depositions of these persons, on the necessity of a full ceremony to constitute a valid marriage. There is also, and I make the observation, without any disrespect to their judgment, on any supposition that they could mean to mislead the Court, some apparent difference of opinion on the effects of *Kedushim*—that is, of the solemn and mutual declarations made, in Hebrew terms, at the delivery of the ring. Mr. Julian says, "that the delivery of the ring is part of the ceremony of the marriage, *which* is necessary to make it complete, and without *which there can be no marriage*." According to him then it is a necessary part of the marriage.—Mr. Almosnino says, "that such *Kedushim*, or delivery of the ring, does not constitute an effectual or valid marriage among the Jews, although it is now *customary* that *the ceremony of marriage* follows that of the *Kedushim* immediately, if it had not previously been done." The third witness consulted, Mr. Delgado, concurs with the first, and says, "that it is an *essential* ceremony, for that the delivery of the ring implies, that the Jewess has accepted the same as her price for which she had sold or dedicated herself." So that it is an actual sale and transfer, and that which gives the husband a property in her person. They

all, however, agree in this at least, that without Kedushim and the ring, the contract, and the nuptial benediction of the seven blessings, amount to nothing. Then the matter stands thus, according to the opinion of all the witnesses, who say in effect that Kedushim is an essential and indispensable ceremony, and that the rest without it will not constitute marriage: since they all say, that the contract and benediction without that will not entitle the parties to live together; that a divorce is not necessary to separate them, and is never granted; and, therefore, undoubtedly, we have got so far—that it is an *essential* part of marriage. I collect this, I think, from the opinions of all these persons, from two, absolutely expressed, and by implication from the other.

What are the effects of Kedushim then? In the first place, the woman cannot marry any other man—she is separated from all mankind as the property of one individual; that is one feature of the matrimonial contract, and it is impossible to describe it in stronger terms. In the next place, the consequence accrues, that she may be guilty of adultery, and is liable even to infamy and punishment, if she has intercourse with any other man;—that also is a pretty strong feature of marriage: the guilt of adultery can arise only on a supposition of a marriage having been completed. In the third place, she cannot be separated but by legal divorce, in the same manner as if an actual marriage had intervened. In the fourth place, I observe in the laws of the Jews, that a person, committing a rape upon a betrothed woman, is liable to be punished, just as in the case of the rape of a married woman. I am enumerating now on the one side what are the circumstances in which this ceremony corresponds with marriage, and these are pretty strong recognitions of a matrimonial character. On the other side there are distinctions to the disadvantage of this character; but they are chiefly civil and temporary distinctions, and relate merely to property. It appears that a Jewess, thus betrothed, is perfect and entire mistress of her own property, not only in the use of it, but also in the disposition; since she can give it to whom she pleases by testament. In the next place, the husband is not obliged to maintain the betrothed out of his property. In the third place, she is not entitled to dower from the property of the man; and he is not entitled to any part of her property in case of her dying intestate. These are the imperfections of the contract as to civil effects.

I observe in the deposition of Mr. Solomon Lyon, a circumstance which is not noticed by the other witnesses, and which may be material. He says, “that where a Jew obliges himself to give his daughter a marriage portion, and she should receive the Kedushim; the man, from whom she so takes it, could not recover the portion from the father, though he might from any other person, if the father was dead and the Jewess was of age, which is thirteen years.” Therefore if this opinion is correct, on the death of the father, where a portion was left, the person giving Kedushim would be entitled to recover, as he would have a vested right in the effects of the woman.

Now, looking at the ceremony which has passed, in these different views, with reference to the circumstances that are favourable and unfavourable, I see, on the one hand, strong recognitions of the *vinculum matrimonii*; on the other, certain disabilities as to property; but rights of property have nothing to do with marriage considered as to the *vinculum*; and then the question arises, Is this contract, so qualified, a marriage, or is it not? I think I may infer from all the witnesses on

both sides, that if consummation had actually passed, at least with the ceremony of Hupa, (which is the declaration, in the presence of witnesses, that he was going to retire, for the purpose of consummating his marriage, and had so retired), it would be a complete and perfect marriage. I collect this from the depositions of all the gentlemen, and from an opinion given by Mr. Azevedo, in a former cause which had occurred among the Jews; and therefore the question is, whether it can be presumed that consummation has taken place? There are some reasons which would incline one to suppose that it had. For it appears that this was an engagement entirely agreeable to the inclinations of the young woman, who writes in language of affection, and in the character of a wife. It appears, also, that the parties had frequent opportunities after the ceremony, and that for some time he continued to have access to her. Considering these circumstances, and particularly the age of the parties, the man being twenty-nine, and the woman sixteen, it might naturally be presumed that consummation had passed. But it is a strong fact on the other side, that he has not pleaded the consummation, being aware that it would be of great consequence that it should be pleaded; and I lay great stress on that omission. No application has been made to the Court to rescind the conclusion, in order to admit the pleading of that fact, and therefore the legal inference is, notwithstanding the general probabilities to which I have adverted, that consummation has not passed.

Then the question is reduced to this, is the ceremony without consummation a complete marriage? I have already stated, that, by the law of nature, this would not be essential; but it may be so by special civil and religious institutions, and there are different systems of matrimonial laws in the world by which it is rendered necessary. Whether it is so by the law of the Jews, is not sufficiently established by any evidence which is before me. There does not appear any distinct proof, from the opinions of the Bethdin negatively, that consummation is absolutely necessary. They admit that Kedushim is *betrothment*, but that may be a nominal and verbal distinction only; and they say, that though there ought to be a written contract and benedictions, yet consummation after Kedushim, without a written contract, would be a perfect marriage; but they do not go so far as to say, that a solemn engagement, not followed by consummation, may not be a complete and valid marriage. There are persons who are examined on the other side, and amongst others, Mr. Lyon, who says "that Kedushim alone is sufficient without consummation."

Observations have been made on the credit of those persons, as being in low situations of life; but it is the habit of the Jews to mix the pursuit of religious studies with secular employments, and they have not a numerous body of men secluded from the business of the world as we have. Some of their Priests, without any degradation, follow likewise other occupations; this is the case also with some members of the Bethdin; there is no call upon them, and no expectation to the contrary, and therefore the weight of their opinions is to be considered, without much disparagement arising from this circumstance. The opinion of these persons is, that "without consummation there may be a valid marriage," although some intimation is conveyed, though not clearly and distinctly expressed, of the opinion of the Bethdin to the contrary. If their opinions were clear and consistent on this point, they would be acted upon

by this Court; but I have considerable doubts on the effect of the answers given by the witnesses on the question—Who are the Rabbies whose opinions are mostly followed by the Jews of the Portuguese community? I think I shall not transgress the limits of my duty, if I look beyond the evidence, but not farther than the evidence fairly leads, as this evidence is not clear and positive on the interrogatory—what are the Rabbinical authorities most attended to by the Portuguese Jews? The answer is, Maimonides and Beth Joseph.

To the character of Beth Joseph(a), I must acknowledge myself to be an entire stranger. The name of Maimonides is familiar enough to all literate persons, as the name of a very learned and eminent scholar, who digested and abridged the Talmud. I understood that his Commentary is considered by many, as almost of equal authority with the text. Of Beth Joseph, also, I am informed that the book is an authority of great weight, and that the author is above all exception, in respect to his integrity and erudition. These therefore are opinions which it would be highly desirable to obtain; for those, who give them, were persons who have delivered their doctrines on general principles, without looking to particular cases, and without influence of any personal nature. They would therefore be witnesses of the highest character, whose fame has diffused itself among Christian Scholars, also, as well as Jews, and towards whom the Court would, upon every consideration, be disposed to join in the general respect which is paid to them upon every question of this kind. A passage has been quoted from Maimonides, according to the translation of Mr. Selden, "*quamprimum puella acquisita est et sponsa facta, citra coitum, citraque deductionem vere uxor esset, adeoque etiam ut quisquis præter sponsum, cum ea rem haberet, is ultimo supplicio, ut adulter, esset puniendus. Nec sine libello repudii, post matrimonium seu sponsalia ejusmodi potuit ejici,*" Lib. 2. c. 1. Selden says, that this was the general doctrine, and refers to the Talmud, Misna, Gemara, and to the ancient and modern Doctors.

As to the other authority, that of Beth Joseph, I find that opinion quoted by Mr. Lyon in these words, "that a marriage by Kedushim alone cannot be invalidated:" from which I conclude, that if the ceremony of Kedushim has passed, and that only, it is a complete and perfect marriage. I will mention also what I find in Brower, the Philo, from whom Christians take very much their notions respecting the rites and ceremonies of the Jews, has a passage to the following effect: "*Sponsaliorum eadem quæ nuptiarum vis est, cum viri et uxoris nomina, atque alia quædam in conventu et frequentia propinquorum perscripta sunt.*" It is true that he adds, "*Sponsalia nuptiæ non erant, sed nuptiarum promissiones;*" but he adds further, "*earundem virum quatenus conjugii vinculum, fides conjugii servanda, amor, dilectio conjugalis spectantur,*" Brower de Jure Connubiorum, lib. 1. c. 24. s. 2. Now, if one could depend on these opinions of Maimonides, as delivered by Mr. Selden, and of Beth Joseph, stated on oath by Mr. Lyon, I think they would be sufficient to decide this question, and ought to be received with perfect acquiescence.

(a) Beth Joseph appears to be a commentary upon the Jewish Law, composed by a writer of the name of Raburn Ashur, infra, p. 385. The terms of the evidence have been retained, though they may seem rather to describe a person.

I must here observe, that another consideration occurs on this state of the evidence, which may be material: Whether, in consequence of the Kedushim, supposing the consummation not to have passed, the man may not acquire the right to that consummation? It is stated by Brower, who may perhaps not be perfect authority on this subject, being himself not a person of that nation, that either party may be compelled to cohabitation, "*ad perfectionem matrimonii cogi sponsus, sponsaque potuit*;" Brower, ut supra. But it has been said, that this Court cannot enforce that obligation, and that it will not attempt to exercise such authority. It is asserted, also, that there is no such authority among the Jews; but if, according to the ecclesiastical law of the Jews, a wife is obliged to comply with such a demand, I conceive there must be power in the Jewish Communion, by spiritual censures, or by some other mode, to compel due submission to it. I do not think that it is open to the supposition that such is not the law of the Jews, merely because it is not aided by the civil authority of this country, and that it may, on that account, be prevented from being carried into complete effect. On all views of probability, one is lead to suppose that there must be such obligation, if the husband insists upon it. There is sufficient proof of the *vinculum matrimonii*; and what can the force of that be, unless it binds the parties at least to that cohabitation, which presumes the mutual use of each other's persons. For what inferior binding can there be?

It appears that a public celebration is not necessary, since the Hupa is as private as any ceremony can be. It is a mere declaration before witnesses, that the man is intending to consummate; and if he retires with his wife for that purpose, it is a completion of the marriage. There is then, on this state of the parties, more than the mere contract "*per verba de presenti*" in the Christian Church,^(a) which was a perfect contract of marriage law, though public celebration was afterwards required by the rules and ordinances of the canon law. In the Jewish law it is

(a) In La Costa and Villa Real, [25th June 1733.] there was a case, of considerable notoriety at that time, brought before the Court of Arches, to enforce a contract of marriage between two opulent persons of the Jewish religion, from which it might be inferred that such a principle was not inconsistent with their own law.

It was a case of marriage contract *per verba de presenti*, in which Dr. Bettesworth observes, on some argument of Counsel relating the authority of the Court:—"An objection has been made, which is new in my opinion, that this is an irregular application, because the case was between persons of a different religion, and therefore not to be done and solemnized *in foro ecclesie*, that is, as I apprehend, it could not be done in their way. It would be very extraordinary indeed, if the Court was persuaded, that it had full proof, that the parties had contracted, or bound themselves to each other in marriage, and that, at the expiration of the time agreed on, he demands, and she refuses to perform. I say this would be fruitless, if the Ecclesiastical Court was not possessed of an authority to decide therein. But I think this Court is possessed of that authority; and I know not where else persons could have any remedy except here."—That case is described in the libel to have been brought originally in the Court of Arches—on the part of Jacob Mendes de Costa, of the parish of St. Peter le Poor, against Catherine de Costa Villa Real, of the parish of St. Michael Hostis in Royola, London. The question appears to have been discussed on the effect of the lady's promises to marry "at the end of the year from her husband's death, if her father should consent." The judgment of the Court decided that it was not an absolute promise, but conditional, and dismissed the cause.

The case was also the subject of an action at common law on the contract of marriage; when the Court held the sentence of the Ecclesiastical Court conclusive against the contract, 2 Strange, p. 661. See also the Duchess of Kingston's case, State Trials, 30th vol. p. 397.

not so, as the man appears to have had a *vested right* to call on the woman to submit, and no public ceremony was required for that purpose of consummation. Then here the man had the vested right, and there is no reason to suppose that there would be opposition to it; since it is stated, in the application to the Court of Chancery, that it was the apprehension of the guardians that it would be carried into effect.

This, then, is the footing on which these parties stand. If the opinion of Maimonides can be relied on, they are actually man and wife; and, according to the other opinions, it is to be presumed, that if the injunction of the Lord Chancellor was relaxed, they would be man and wife, without any further celebration. The man has the moral right, and I should presume also, according to the Jewish Church, a legal right to call on her to submit.

Having to decide on this question, which is perfectly new, and which may affect the rights of a great body of British subjects; feeling myself to be on novel ground, on which doubts ought to be entertained, and questions sifted with great caution, and being unwilling to proceed to the decision of this question without fuller information on this important part of it, I shall adopt the prudent measure of framing a few particular questions, which I shall address to the Bethdin, and on which I shall request the assistance of the counsel in drawing up, giving either party the opportunity of taking any other opinion upon them. The substance of these questions will be, First, whether, as stated by Mr. Lyon, it is the interpretation of Beth Joseph, that the Kedushim alone constitutes valid marriage? Secondly, whether the Bethdin will declare if the opinion of Maimonides, as cited by Mr. Selden, is erroneous? Thirdly, whether, by the law of the Jews, a person who has entered into Kedushim has a right to demand from the wife, that she shall submit to perform the duties of a wife in the way of matrimony? There may be others which I may find it necessary also to add to these, to satisfy my judgment more fully on this important question. When I have received the result of these inquiries, I shall endeavour to discharge the remainder of my duty towards the Court of Chancery, and to the parties.

On a subsequent day, this cause came on again, on the Answers of the Bethdin, to the Questions proposed by the Court; viz.

1st.—Whether it is admitted that Beth Joseph, who is proved in this cause to be one of the principal guides of the Jewish Portuguese Church, has laid it down that the Kedushim alone cannot be invalidated?

78, 84, 2d.—Whether the assertion of Maimonides, as cited by Mr. Selden, Uxor Ebraica, l. 2. c. 1., in which it is declared, that the woman who has received Kedushim is *vere uxor*, truly a wife, although consummation hath not passed, is an assertion without foundation?

3d.—Whether the passages in the Misna and the Gemara, referred to by Mr. Selden, in confirmation of this assertion, do or do not support the same?

4th.—Whether a man, who has given Kedushim, has not a right acquired thereby to call upon the woman, who has accepted it, to submit to conjugal embraces? and whether the woman, who has received the same, is not bound in conscience, and in law, to submit thereto when duly called upon?

5th.—Whether a woman can be dismissed after Kedushim except for such reasons as are legitimate causes of divorce after marriage?

6th.—Whether a man, who has married a wife by the ceremony of the Hupa but without a Ketuba or marriage contract, is entitled to demand the marriage fortune from the father or family of the wife?

7th.—Whether a wife so married is entitled to dower?

JUDGMENT.

SIR WILLIAM SCOTT.

In the application of the principles of the Jewish law, and Jewish forms, to a question like this, which has been sent to this Court to be decided, it is not matter of surprise that some misapprehension or some apparent inconsistency should intervene. And I think there has been some confusion of this kind, which I am now enabled to explain. It was pleaded in the first article of Mr. Belisario's allegation, which was given in an early stage of this cause, that the ceremony, which constitutes a valid and legal marriage amongst the Jews, is performed in a manner which is there described. But, in a subsequent allegation, on the part of the wife, it is pleaded, that the ceremony so described is not a valid marriage, but only "a betrothing;" yet, in the following article of the same allegation it is pleaded, that the factum, as pleaded by the husband, according to such ceremony, does not constitute a complete *betrothment*.

I think I find the solution of that apparent inconsistency in an allegation, which was afterwards introduced but rejected; and, I still think, properly rejected by the Court. It was there pleaded "that the Bethdin, a domestic forum of the Jews amongst themselves on matters of this sort, had pronounced the ceremony in this case to be a *doubtful betrothment*;" which I now apprehend is to be explained by what was pleaded in the article of the allegation to which I have alluded,—that it was *not a complete betrothment*. In the form in which this sentence of the Bethdin was pleaded, it was impossible to understand any thing more than that they had enquired into the proofs, and could not satisfy themselves as to the fact, and that it had been in that sense pronounced a *doubtful betrothment*. It was not stated, that there was a distinction on this point, in the Jewish law, or that there was a particular species of betrothment known to the Jewish law under this description. It was merely stated as a *doubtful fact*, without any information to the Court, as to the rules of law, by which it was so determined. They said only "that they had examined into the case, and found it *doubtful*." That sort of information appeared to the Court to be perfectly useless, and on that account that allegation was rejected.

But it appears now, when we have the evidence before us, and have drawn the business nearly to its proper point, that the plea, on the part of Miss Lindo, ought to have been framed in this manner. It should have alleged, *not the law of marriage*, as it was there^(a) described, and which their own witnesses have disproved, by saying, that the marriage may be good and valid though not regular and formal; but it should

(a) "That the ceremony essential to and which constitutes an effectual valid and legal marriage among Jews is as follows, to wit, That a formal contract in the Hebrew language must be entered into by the bridegroom with the bride, according to the rites and ceremonies of the Jews, and the rules of the Jewish congregation to which the parties belong, and such contract must be drawn up by the priest or minister who marries them, and be signed by the bridegroom and two witnesses, and must be also entered

have alleged, "that a contract like that into which Miss Lindo had entered with Mr. Belisario, was not a valid marriage;—that it was at most only a betrothment, and a *betrothment of a doubtful nature*, which was a description of betrothment known to the Jewish law, and *defective in legal validity*."

If a plea of that sort had been set up, and witnesses examined upon it, I should have seen the bearing of the question, and the party would have had the benefit of the principles and rules of the Jewish law on that point; whereas, by pleading a law which is erroneously stated, and a ceremony which is described by their own witnesses to be a *doubtful betrothment*, without explaining in what that doubt consists, the plea left the Court without the necessary information, and it found itself under an impossibility of giving a definitive sentence upon it.

The law set up by Miss Lindo, had been disavowed. It was necessary therefore to be informed what the law actually was, on which the party meant to rely. It appeared, after the argument upon the subject, and on due consideration of the evidence; that the main point in the case was narrowed to one or two questions—whether a *nudum pactum*, of the kind described, without consummation, was a complete marriage—and further, whether upon a *nudum pactum* of this kind, the party had a right to compel the woman, by the Jewish law, to a surrender of her person in the way of matrimonial rights? because if this right attached to the husband by the Jewish law, I should be inclined to hold what has passed in this case to have constituted a valid marriage. These I consider to be the real questions between the parties. For I think it was proved very satisfactorily, that if the ceremony had been accompanied by consummation, it would have been, according to the laws of the Jews, a valid marriage. In order to obtain the necessary information on these points, I directed questions to be addressed to the Tribunal of the Bethdin; and the answers to these questions have now been received. It is no objection to the free use of these answers that they are *not upon oath*; because I receive this as information on foreign law, upon which the Court is to determine, furnished by persons professing that law; and it is in the experience of all of us that such information is usually received in this form; and I learn on inquiry, from those who are well versed in the practice of the Court of Chancery, that it is the usual practice of that Court, to receive information on foreign law in the same manner,—*not on oath*,—but on a reliance in the honour and integrity of the Professors of that law. If there is any doubt, or intention to raise a doubt on this point, I could wish that it might be intimated before I proceed further; because the consequence would only be that the cause must be opened, and the opinions of these persons must be taken at great expense and under great delay, in the form of depositions. Finding that no objection is made, I shall proceed without reserve to use the answers which have been communicated to me.

The first question, on which I required further information, arose out of the deposition of Mr. Lyon, who had stated "that Beth Joseph was a guide of the Jewish Church of the highest authority in such cases:"—

and registered in a certain book or books kept for that purpose in the Synagogue, or by the priests or ministers of such congregation, and the entry thereof must be signed by the bridegroom and two witnesses, which being done, the original contract is always delivered to the bride." *ut supra*, p. 371-2.

and on the fifth interrogatory he says, "that according to the Jewish law given by Moses, the only ceremony necessary to constitute marriage, is that of the Kedushim, but that, since that time, the Rabbies have added the Ketuba; that in Beth Joseph it is said, that a marriage by Kedushim alone, that is without consummation, may be so far good, that it cannot be invalidated."

The answers which I have received come from the Bethdin of the Jews, and from two Rabbies. The Bethdin say, "that when Kedushim is given, with all the circumstances necessary for the performance of the ceremony, and the parties labour under no disability of age, consanguinity, affinity, mental disability, or pre-contract in the female—and the ceremony was then performed in the presence of two competent witnesses—that ceremony is termed by the Hebrews *positive and complete betrothment*; but when any one of the circumstances, which are absolutely essential, is wanting, it is then no Kedushim at all, and is null and void. If, from the evidence of the witnesses, it cannot be inferred, whether all the circumstances necessary for the perfection of the ceremony, as where there is ground to suspect the qualification of the witnesses, or the ability of the parties; it is pronounced a *doubtful betrothment*, for it hath peculiar effects; and such a decision is a complete and excellent judgment from a Jewish tribunal, it being conformable to the Jewish laws. In each of these instances, respectively, the tribunal neither renders valid nor invalid, nor doubtful, but merely applies the law to the fact. In a fourth instance, it may be said that the Kedushim can be invalidated, and that is when the betrothment has been effected with all requisites, both in perfection of act, ability of parties, and qualification of witnesses; but if the parties, in the performance of that act, have trespassed on some Rabbinical injunction, and transgressed some bye-law instituted for the good order of society, those Kedushim are voidable, and can be invalidated by the Bethdin; for there is an established rule in the Talmud that says, 'Whoever gives Kedushim, it is with the approbation and consent of the Rabbies:' the Bethdin can render the Kedushim invalid, by alienating, *ab origine*, that property, whereby the man effected the betrothment; or even if it were effected by carnal intercourse, by constituting that act an act of prostitution. Every Bethdin, of whatsoever time and place, may exercise that discretionary power; but we never assumed that authority, because we do not find upon record any precedent, wherein our predecessors exercised that power, though warranted by law. All that we have said here is not only the opinion of the author of Beth Joseph, but of every learned Jew."

It is then asserted by these gentlemen, as I understand them, that wherever there is a defect of ceremony, which the rules of the Rabbinical law prescribes, it is in the power of the Bethdin to set aside a marriage deficient in any of those particulars. One of the private persons who has been examined, Mr. Lyon, answers: "I know well that Beth Joseph says, 'that the Kedushim, if properly given, cannot be invalidated; and the woman is called *Eshet-ish*, which means the wife of him who gave her Kedushim for every legitimate point of marriage.'"

Mr. Ish Yemene also says on this subject, "that any man of knowledge will understand, that his opinion must be, that when any woman has taken Kedushim, in the presence of two witnesses, with a free will, it is a perfect Kedushim, and she is called *Eshet-ish*." He cites certain

passages in which it is laid down, in Beth Joseph and in others, "that what constitutes marriage is the Kedushim." The witness concludes, "that from all this it is proved, that, according to the opinion of Beth Joseph, no Kedushim *properly* given can be invalidated."

378, 80. The second question, or rather the second and third, which may be considered together, arose out of the depositions of Mr. Ish Yemene, who refers to Maimonides as an author of very high authority; and the Court was much impressed with a passage from his works, said to be found in Mr. Selden, in which is described the particular position, on which I wished to be informed—"Whether a woman, having received Kedushim, was a complete wife, notwithstanding matrimonial intercourse had not passed?" Mr. Selden refers to certain passages as well in 'the Misna as in the Gemara. The answer to that question is in these terms: "The assertion made by Mr. Selden, that the woman, who has received Kedushim, is *vere uxor*, is unfounded; for the faithful translation of the Hebrew words is an appellation applicable both to a woman who is simply betrothed, as also to a married woman, wife or *uxor*. But the special name for a married woman is, in the Rabbinical style, *Nessua*, *taken*, *nupta*; and in the Scripture style, Behulah Behal, *Lorded* of or by a *Lord*. Mr. Selden is right in what he asserts, 'That if any man, except the betrother, should have connexion with a woman, though but simply betrothed, he would incur the punishment of death. And also, that to be released she must have a divorce; for, in this respect, she is like a married woman.' It is merely as to the punishment of death that Mr. Selden refers to the Misna and Gemara, and not to the assertion of *vere uxor*; for, on that very passage of the Talmud, as in every other passage of the same, the Talmud calls the woman, who has accepted Kedushim, *Mehorassa*, or *Arussa*, betrothed, but not *Nessua*, *taken*, as corresponding with the English word *married*."

I understand then from this representation, that there is a word applicable both to a *betrothed* woman, and to a *married* woman; but that there is also another term *peculiar* to a married woman; and that Mr. Selden is understood to say that a woman, so betrothed, is *vere uxor*, to the effect that she cannot be separated but by divorce, and that a person, having intercourse with her, commits adultery, and becomes liable to the penalties and punishments attending it; but it is not understood to convey a general assertion that she is *vere uxor*, to all intents and purposes.

The private persons who have been examined on this question, give rather a different account. Mr. Lyon is unacquainted with the Latin tongue, and all that he can say is, "that Eshet-ish means wife of him that gave the Kedushim, and she is prohibited to all the world." Mr. Ish Yemene is ignorant of the Latin tongue likewise, and confines his answer upon this question to his belief of the authenticity of the citations of Selden, so far as he collected them.

The next question, which appears to go to the point in issue was, "whether a man, who had solemnly given Kedushim, has not a right to call on the woman to submit to conjugal embraces, and whether she is not guilty of a breach of marriage if she refuses to submit?" The answer of the Bethdin is, that "a man, who has given Kedushim, is so far from having a right to call upon the woman, who has accepted it, to conjugal embraces, that, on the contrary, the parties are forbidden to have connubial intercourse in the state of betrothment, and would commit a

sin, and would incur corporal punishment by so doing; that the right, which the man acquires in the betrothed woman, is that he can demand of her to prepare for being admitted to the matrimonial state, within a convenient time: and when that period is expired, it is expected that she will surrender herself to enter the Hupa, which constitutes marriage; but she is not bound in conscience and in law to submit thereto. The consequences of non-compliance are, that she will be called before the tribunal, and interrogated, why she does not fulfil the marriage promise? If she says, that her non-compliance proceeds from aversion, and that she detests the man,—then he is ordered immediately to give her divorce, and would be legally compelled so to do in case of refusal. But if she alleges frivolous excuses only, the Tribunal will admonish her, and if that proves ineffectual, she is to be called out daily in the seminaries and synagogues for four successive weeks, and if she continues intractable, at the expiration of twelve months, the man will be compelled to divorce her."

According to this explanation, notwithstanding she has received Kedushim in the most solemn form, she may assert her dislike, and the man will be compelled to divorce her. If this be the case, undoubtedly it is impossible to say that there is a *vinculum conjugale* existing between the parties: It is a contract which binds to nothing, and is determinable at her own pleasure.

It is stated, indeed, that there is a difference of opinion amongst some of their ancient doctors on this point; but the authorities, on which they principally rely, warrant the construction which is here given of the Kedushim and its legal effects. This is the opinion of Rabbi Isaac Alphassi, the first of the three chief guides, on whose authority all religious matters are determined. Maimonides, who is the second authority, says the same, and also the Jewish doctors, some contemporary, and others subsequent to the said Alphassi and Maimonides. But Raburn Ashur, who is the third of the chief authorities, and the author of Beth Joseph, with some others differ, and say, "that when a woman will not comply, the man cannot be compelled to divorce her, but merely requested thereto; but that no coercive measures can be used to compel her to enter the matrimonial state; for even a married woman, who should recede from conjugal rights, would incur no punishment as for a transgression, but she would lose only her maintenance, and the dower with which she had been endowed."

The Bethdin describe the opinion of the leading doctors to be, that the man may be compelled to divorce her,—and I understand them to concur so far as to state their own opinion to be, that the man cannot compel the betrothed woman to surrender her person; but, on the contrary, that she may disavow the engagement, and, on making a public disclaimer, will be released under the authority of the Bethdin.

Most certainly this is a very different account from that which we have received from others, particularly from Mr. Lyon and Mr. Ish Yemene, who both say, "that he has a right to demand his wife, and call on her to come to his house to be at his command."

These persons refer to authorities, and so do the Bethdin; and I must suppose them fairly cited, though, I confess, these opposite authorities do not much enlighten me. Mr. Ish Yemene goes on to state, "that the woman who rebels against her husband in conjugal points, is to be proclaimed on Saturdays in the synagogue, and the Bethdin ought to

admonish her, that if she does not, within four weeks, submit to her husband's commands, though her dower be very considerable, it shall be lost, and *that* as well in the case of the *betrothed* as of the *wife*." Maimonides says the same,—“that a betrothed, whose time has arrived, and does not submit to her husband, is under the same law which has been described respecting the wife.” Rabbi Samuel says, “that unto the betrothed the Bethdin give thirty days, and if the relations should prevent the woman from submitting, the like thirty days will be allowed to them, and, at the expiration of that time, if the order of the Bethdin is not obeyed, the punishment of excommunication will be denounced against them.”

Another question was, “Whether, after Kedushim, a woman can be divorced, except for such causes as would be causes of divorce after marriage?” I think the answers all agree in stating, that there is no assignable difference, but that great power is given with respect to divorces in one case as well as in the other.

The sixth question referred to the rights of property; upon which the Bethdin say, “This question we must analyse, because it comprises several ideas; we deem it necessary first to describe what Hupa is, lest it should be misrepresented. According to Maimonides and the author of the Beth Joseph, this ceremony is—‘that the man brings the woman, whom he has previously betrothed, to his house, sets her aside for his special end, and is united with her.’ Which bringing home appears from the Talmud to be prescribed to be done in a public and ostensible manner. This bringing home, however, and this setting aside and being united with her, is the very essence of marriage, though it be not solemnized by the nuptial benediction, nor marriage contract; but it is ordained, that the solemnization and the Ketuba, or marriage contract, should precede the marriage, which is never omitted when things are done in a regular and proper manner. Some, however, describe the Hupa to be in the following manner:—The bride and bridegroom are introduced under a pavilion or canopy, attended by the relations and friends; and that the espousal and nuptial benediction being said, constitute the Hupa. This is the customary mode used in this country and most other countries with which we are acquainted. We are of opinion, that either this or the other mode will constitute Hupa: the latter, because it is the one generally adopted, for we greatly revere customs universally and anciently established; the former, because it is laid down by the great Maimonides and the author of Beth Joseph. When either of these modes of performing Hupa has been observed, though consummation has not passed, the woman is married, provided she is in a fit state of receiving connubial embraces; otherwise, though she be brought home, she is but Arussa, or Betrothed.” In another place they say, “As to the relation that the Ketuba, or marriage contract, has with respect to the marriage fortune,—we must observe, that nothing is called Ketuba, but what a man binds himself to give to his wife as a dower; but, what the woman brings to her husband in marriage, is called Nedoniah, donation, and the right of the man in this donation entirely depends on the articles of agreement between the parties, previous to their entering into the married state. These articles are either specified in the Ketuba by reference to another written document made for the purpose, or they are expressed in the very Ketuba. But, if previous to entering into the married state, no stipulation was made, expressing

what right the man should have in the property which the woman possesses, or becomes entitled to at her marriage, that property, whether moveable or immoveable, passes with the woman in *potestatem viri*, for the husband to enjoy the produce thereof during his natural life, and if he survives the wife, continuing her husband till the time of her death, he becomes then master of the principal. Now since Hupa, as above described, constitutes marriage, even without Ketuba or marriage contract, the husband obtains a right in his wife's property either according to previous stipulations made for the purpose, or in the produce thereof, if there be no such written agreement."

Upon the seventh question they say, "That having laid it down that the Hupa is the very essence of marriage, consequently, a woman so married, though there be no Ketuba, is entitled to a stated dowry of fifty shekels, if a virgin, or twenty five shekels if otherwise, this being one of the ten rights that she can claim of her husband, whether he be bound himself to fulfil them by a written contract or not."

With respect to any question of property, I think it was proved by the general evidence that the rights of property did not necessarily follow the Ketuba. The doubt then was, whether there might be a right to the person of the wife, though not to her property, which might constitute the *vinculum matrimonii*, and give him a right to call upon his wife to fulfil it, either by his own authority, or by resort to the Jewish tribunal which has jurisdiction in matters of this kind.

Upon this important point there is a difference of opinion, and great opposition between the witnesses. There is, on one side, the Bethdin positively asserting that the man has no power of his own, nor any power to call in the authority of the Bethdin for that purpose; but that he is compellable to give up the contract, if the wife persists in her aversion to it. On the other hand, there is the opinion of private Rabbies, that it is otherwise. Under this difference of opinion on a point which goes to the very root of the question, how is the Court to decide, and to which authority is it to adhere?

It is to be observed, that the Bethdin is the tribunal which administers the law, on questions of this nature, as it exists in this country, and therefore must be presumed to understand it. It is very possible that the Jewish law may, like other systems of law, receive different modifications by the particular laws of different communities. There are principles of marriage law generally prevailing in Europe; but the canon law subsists under very different modifications in different countries, according as the different institutions of the countries in which it is received operate upon it. If I am to inquire into the operation of a foreign law, I must look not to the more general ceremonies, but to those of the particular countries respectively.

It appears that Mr. Ish Yemene has been a professor of Jewish law at Hamburgh: it is possible, therefore, that he may speak according to the particular modifications of the Jewish law in that country, or it may be that there are certain modifications of the Jewish law in this country which are best known to those who are in the habit of administering it here.

Supposing, therefore, that the attainments of knowledge are equal in the individuals, I think the balance of the authority must incline to those who are the professors of the law as it is administered in this country. I must consider also, that the opinion of the Bethdin is a judicial opi-

nion, and not merely the opinion of an individual, the weight of which travels no further than the reputation of his own personal attainments. It is an authoritative opinion, which not only conveys knowledge, but is also sanctioned by the qualifications of probity, learning, judgment, and discretion, which must be presumed to have recommended the individuals to the judicial situations, which are entrusted to them.

The Bethdin say, as I think I should, that this is a contract absolutely determinable at the will of the woman; that, if called upon by Mr. Belisario to fulfil the engagement, she has nothing to do, but to say that she detests him, and does not choose to continue his partner. If that is so, I should have great difficulty in saying that there is an absolute vinculum subsisting between them; I must therefore pronounce, if this information is correct, that he has no right to consider himself as entitled to the character of husband.

It is possible there may be an error in the determination. I am sensible of the extreme difficulty which is to be encountered upon a subject so far out of the reach of the ordinary studies of this profession. But it is my comfort that, if there is error, it is not mine. It lies with those who have given this information—who are bound to give it conscientiously, and I am bound conscientiously to receive it. If I was to determine the question of marriage on principles different from the established authorities amongst the Jews, as now certified, I should be unhinging every institution; and taking upon myself the responsibility, as Ecclesiastical Judge, in opposition to those who possess a more natural right to determine on questions of this kind. On these grounds I am of opinion that Mr. Belisario has not proved his case, and that Esther Lindo is not to be considered as his wife.—The words of the decrees must be simply—that *she is not the wife of Aaron Mendes Belisario*.

Affirmed on Appeal, by the Judgment of the Court of Arches.

LINDO v. BELISARIO.

Judgment in the Court of Arches.

SIR WILLIAM WYNNE.—This is a suit of jactitation brought originally in the Consistory Court by Miss Lindo, a minor, or rather by her guardian, against Mr. Mendes Belisario.

The cause commenced by a citation which bears date the 28th of November 1793,—a libel was admitted, without opposition, pleading the jactitation. An allegation, justifying the jactitation, was admitted on the part of Mr. Belisario, and an allegation in reply, on the part of the minor, was given in. Upon these pleas, and the evidence taken upon them, the cause was heard in the Consistory Court of London, on the 4th August 1795; when the Judge of that Court, by his interlocutory decree, pronounced that Aron Mendes Belisario had failed in the proof of his allegation, and that the said Esther Lindo, spinster, was not his wife. From that sentence the present appeal is brought.

A very singular case it most undoubtedly is, in which an Ecclesiastical Court is called upon to pronounce, and has pronounced, upon the va-

lidity of a marriage between a Jew and Jewess, celebrated according to the rights of the Jewish religion. The only instance within my memory, which goes a very considerable way back, in which a Jewish marriage was at all put in issue in any Ecclesiastical Court, was that which came before the Prerogative Court in the year 1794, in the case of *Vigevna and Silveira against Alvarez*. (a) That was an interest cause. It was a question, who should be entitled to the property of the party deceased? The person, who appeared before that Court, urged himself to be the legitimate son of the person whose property was disputed, which was disputed by others:—though the circumstances of that marriage were pleaded, yet it came to no sentence, because the parties agreed.

(a) On admission of a libel, pleading "a marriage between Jews according to the rites and ceremonies of the Jewish religion," Dr. Harris and Dr. Laurence objected, That persons coming before the Ecclesiastical Court to claim any right by marriage, under that jurisdiction, must show the marriage to have been agreeable to the rites and ceremonies of the Church Christian. That it was so decided in *Haydon v. Gould*, Prerog. and affirmed in the Delegates, 1 Salk. p. 119. That there had been another case also, *Hutchinson v. Brooksbank*, Levinz, 376. of a person sued for fornication, where there had been a marriage in a conventicle, and in which there was a motion for prohibition, on which the court of common law never finally determined. That the same principle held as to Jewish marriages, and there was a clause in st. 6 & 7 Will. & Mary, ch. 6. s. 5, 7, and 8, respecting Quakers, Papists, Jews, or any other persons who shall cohabit and live together as man and wife, and be thereby liable to pay the several and respective duties payable on marriages, &c. "That nothing herein contained shall be construed to make good or effectual in law any such marriage or pretended marriage; but they shall be of the same force and virtue, and no other, as they would have been if this act had never been made." That it might have been sufficient perhaps to have pleaded the owning and acknowledgment of the parties, and the marriage might then have been taken on the ground of presumption or repute, but that if the actual marriage was pleaded, it must be such a marriage as was agreeable to the rites of the church of England.

In support of the allegation, Sir William Scott and Dr. Nicholl submitted, that this was the first time that the principle had been maintained, that Jews cannot celebrate marriages otherwise than according to the rites of the Christian church. The peculiar and fundamental tenets of their religion were adverse to their use of the rites of the Christian church, and distinguished their case materially from Dissenters, who acknowledged the same fundamental doctrines, and did, occasionally, frequent the service of the church. As to Quakers, the question had never been formally decided. But as to Jews, it was unreasonable to maintain, that their marriages according to their own rites should not be valid. They had existed always as a separate community, and in some respects on the footing of aliens, and were entitled to have their marriages tried by their own law. Acts of parliament had recognized this principle in declaring that the marriage act should not extend to Jews. If no Jewish marriage could be good, in all cases of intestacy the Crown would succeed to the effects, which had never been maintained; that the very silence on this point was a recognition of the validity of such marriage; and as to the distinction that you might plead the acknowledgment, but not the fact of marriage, it was one which the Court would not sustain.

Court.—Sir William Wynne.—The objection taken is, as far as I know, perfectly novel. I do not recollect any case in which I can name, in which a Jewish marriage has been pleaded; and I take it there has been no case, in which a Jew has been called upon to prove his marriage. If there had, I conceive that the mode of proof must have been conformable to the Jewish rites; particularly since the marriage act, which lays down the law of this country as to marriages by banns or licence, for all marriages had according to the rites of the Church of England, and with an exception for Jews and Quakers: That is a strong recognition of the validity of such marriages. As to Dissenters, there is no such exception, and no one would trust to the rules of their particular dissenting congregations, for the validity of marriage. The comparison, therefore, between the Jews and Dissenters does not hold, and more particularly in this, that the Jews are *Antichristian*, the Dissenters *Christian*. Dissenters marry, and Papists marry, in the church of England. In *Haydon v. Gould* the marriage was according to their own invention, and the Prerogative Court refused to acknowledge that marriage. Here the parties are alleged to have been married "according to the rites of the Jewish church." And I am of opinion, that the allegation is very proper to be admitted.

No Jewish marriage has come before this Court at all, except that. I was not aware of the instance, which Dr. Swabey has mentioned to-day, of *Andreas v. Andreas*, which passed in 1737; where, as I understand the statement, there was a suit for the restitution of conjugal rights brought by a Jewess against her husband, and the libel was opposed upon the ground, that a Jewish marriage was not a matter for the jurisdiction of the Ecclesiastical Court. In that case the plea was admitted, but it does not appear to have gone any further. (a) The validity of the marriage, therefore, might not have come in issue at all in that case; because the person who brought that suit, insisted that there had been a Jewish marriage, and pleaded the fact, that the plaintiff was the wife of such a person. So far as it went, therefore, the Court was not to inquire whether it was a valid marriage, or not; but taking the fact to be, as you always do, upon the admission of a plea, that she was the lawful wife, she desired she might have the aid of this Court, calling upon her husband to restore her conjugal rights. The Ecclesiastical Court was the only one they could apply to. The Jews are entitled to civil rights of every kind, and particularly those of marriage; and therefore there must be a Court that shall carry those rights into effect, as well as the rights to property. It does not appear to me, that the validity of the marriage would have come in question at all, so far as the pleas went.

The case of *Green v. Green* (b) was a case of a Quaker woman bringing a suit of restitution against her husband. The same objection was taken, that they were not persons married in such a way as this Court would recognize. I do not at present remember whether that suit ever came to a sentence.

This is the first cause, therefore, where the validity of a Jewish marriage has been put distinctly in issue in an Ecclesiastical Court. That being the case, it is very material for me to consider how the matter comes before the Court, and with what view, especially when it comes directed by the high authority which has sent it to these Courts. It appears, by

(a) *Consist. 4 sess. Nov. 24, 1737, before Dr. Henchman.* *Andreas and his wife were both Jews, and were married according to the forms of the Jewish nation: she cited him to answer to her in a cause of restitution of conjugal rights. On admission of the libel, Dr. Strahan objected, that, as they had been married according to the forms of the Jewish nation, and not of the Church of England, the Court could take no notice of such marriage, and she could not institute such a cause against her husband in the Ecclesiastical Court. And the case of Green v. Green was cited, where a Quaker instituted such a suit, and the libel was dismissed, because they were not married according to the forms of the Church of England.—The Court was of opinion, however, that as the parties had contracted such a marriage, as would bind them according to the Jewish forms, the woman was entitled to a remedy, and that the proceeding would well lie, and admitted the libel.—In 1661 a marriage between Quakers, according to their own ceremonies, was held valid at the assizes at Nottingham, in a cause of ejectment p. 492, Sewel's Hist of Quakers.—In the case of Harford v. Morris, Mr. Justice Willes said, that he remembered a case many years ago upon the Circuit, where a Quaker brought an action of Crim. Con. in which it was necessary to prove the marriage. The objection was taken, that he was not married according to the rites of the Church of England, and the point was argued; but it was overruled; and the plaintiff recovered thereon. In Dodgson v. Haswell, Deleg. 1730. There was a suit between two Quakers, in which the libel pleaded a marriage had, in the manner usually observed by those of their religion, by the public declaration thereof at their monthly meetings in the form pleaded, and that notwithstanding the defendant had refused to solemnize and consummate. The defendant admitted the contract, but alleged that it was conditional. There had been two sentences against the defendant in the Consistory of Durham, and afterwards at York. It does not appear what was the result of the proceedings in the Delegates.*

(b) *Vide preceding Note.*

instruments which are annexed to each of the allegations given in, that the proceedings in the Consistory Court were commenced, in pursuance of an order made by the Lord Chancellor, that Abraham De Mattos Mocatta should institute a suit in the Consistory Court of the Bishop of London, in behalf of Esther Lindo, to whom he is guardian, to try the validity of the marriage said to have taken place between her and Aaron Mendes Belisario. It is further pleaded, that this order was obtained by the petition of the Executors of the wills of the Father and Mother of the said Esther, and the Trustees of a sum of money under her father's will, amounting to about 4,000*l.*; that, by the will of her Mother, the interest of certain monies is to be applied to her use, until she attained the age of twenty-one, or day of her marriage, provided she married with the consent of the major part of her Mother's Executors; but in case she married without such consent, then the money was to go to her issue, and in default of such issue, to be divided among the other daughters of the Executrix. It has been further stated to the Court, that Aaron Mendes Belisario was a person in low circumstances, and that it was a very improvident match, but that he insisted she was, in point of fact, his wife, and was married to him on the 26th of July 1793, and threatened to institute proceedings at law to get possession of her person and property.

Under those circumstances, it became necessary, before the Court of Chancery could stir in this business so as to make any order, to know whether there had been a marriage, and whether the young woman, by whose guardian this suit was instituted, was a wife or not. That is the question to be determined; and it was of consequence, because it further would arise, supposing she had married without the consent of the executors, whether she was legally married or not? In order to determine this, it was referred, by the Lord Chancellor, to the Consistory Court of London, where the parties were domiciled. The reference must, undoubtedly, have been made upon the analogy of courts, the Court knowing, unquestionably, that, by the law and constitution of this country, the Ecclesiastical Court is the only court which has cognizance of marriages; but it was without considering more particularly what the persuasion or religion of the parties was. It is sent to the Ecclesiastical Court, which is the ordinary jurisdiction with regard to marriages, but decides upon very different rules and grounds than those upon which this must be considered. In marriages between Christians, the Court is in possession of the law which it is to administer, and must be supposed to be conversant in that law; but that is not the case with respect to the law of the Jews. The Court Christian, as it is called, has no power upon that law but by analogy. It came to the Consistory Court, and the Judge seeing in what manner it was brought, took certain rules for his guide, I think very properly, and I shall do the same. The rule of decision must necessarily be different with respect to this marriage, from that which it would be between Christians. I must attend to the ground upon which it was determined, and the reason of it being sent from the Court of Chancery, which was to know, whether the ceremony, which took place, constituted a good marriage? Perhaps it may be said, that it might be as well tried by a jury as by the Ecclesiastical Court; but as it comes directed by the High Court of Chancery, I must inquire as well as I can; obtain the best information I can, and make such a return to that Court, as to the best of my judgment is right, either that the party

is the wife, or is not the wife of Mr. Belisario:—from thence concluding, that he will be entitled to her fortune, as is directed by the will of her mother, supposing her to be the wife, and that he will not be entitled either to her person or property, supposing her not to be. That is the question I am to try, whether she is the wife of Mr. Belisario, who is the party in this cause; and if I find that he is not entitled to the rights of a husband over the person and over the property of this lady, as his wife, that must be the answer which this Court is bound to return. What then is the evidence respecting that fact, and the effect that fact would have among persons of the Jewish religion, and persons best able to tell what the Jewish laws are?

It is proved by the witnesses examined upon Mr. Belisario's allegation, that the sister of Esther Lindo was married to the brother of Aaron Mendes Belisario; that the parties in this cause often met at Jacob's house, and that an intimacy was soon contracted between them; Esther Lindo being at that time a girl of the age of sixteen, and Mr. Belisario of the age of twenty-six or twenty-seven. The two witnesses, who depose to the fact of marriage upon which Mr. Belisario rests his case, as to its being a valid marriage, are Lyon Cohen, who is described as a tailor, and Abraham Jacobs, residing in the parish of St. Mary, Whitechapel. He says, to the 6th article, "that he knows and is intimately acquainted with the articulate Aaron Mendes Belisario, party in this cause, who is a Jew of the Portuguese nation, and the deponent also knows the articulate Esther Mendes Belisario, formerly Lindo, acting by Abraham de Mattos Moccatta, her guardian, the other party, who is a Jewess of the same nation." To the 14th interrogatory, he says, "that being intimate with the said articulate Aaron Mendes Belisario, he asked the deponent, about three or four days before the marriage hereinafter mentioned, to attend and be a witness to his marriage; that the deponent consented thereto; and the Friday following being appointed for such marriage, which was the 26th day of July, he also desired the deponent to ask a friend of his to be the other witness thereto, the ceremony of such a marriage among the Jews requiring two witnesses, who must also be Jews; that the deponent accordingly, on the Thursday the 26th of the said month of July, asked his fellow-witness, Abraham Jacobs, with whom the deponent was intimate, to go with the deponent on the next morning to the house of the said Jacob Mendes Belisario in Little Bennet Street aforesaid, where it was agreed that all the parties were to meet, and the said ceremony was to be performed; and the said Abraham Jacobs having consented thereto, on the next morning, being Friday the 26th day of July, accompanied the deponent to the said Jacob Mendes Belisario's house about nine o'clock in the morning, where they met the said Aaron Mendes Belisario, and breakfasted with him; that the said Jacob Mendes Belisario and his wife were out of town; and after that they, the deponent and the said Abraham Jacobs, had been about two hours or two hours and a half at the house of the said Jacob Mendes Belisario, the articulate Esther Mendes Belisario, then Lindo, came to the same house, and went up stairs into a room on the first floor, accompanied by the said Aaron Mendes Belisario, who, a short time afterwards came down into the room where the deponent and the said Abraham Jacobs were waiting, and desired them to walk up stairs; that they accordingly went with him into the room where the said Esther Lindo then was, and they were then introduced by him to her; and after

a little ceremony between all the parties, the said Aaron Mendes Belisario, intending to proceed with his marriage, did, in the presence of the deponent and the said Abraham Jacobs, who are respectively Jews, say to the said Esther Mendes Belisario, then Lindo, at the same time holding a ring to her, "Do you know that, by taking this ring, you become my wife?" to which she answered she did; that the said Aaron Mendes Belisario then said to her, "Do you take it with your free will and consent?" to which she answered, "I do;" or they then expressed themselves in words to that effect; and thereupon the said Aaron Mendes Belisario placed the said ring on one of her fingers on her left-hand, but which of her fingers the deponent does not recollect," nor is it material to the validity of such marriage, which she tendered and held out for that purpose, "and freely and voluntarily accepted and received the said ring, and, at the same time that the said Aaron Mendes Belisario put the said ring on the said Esther Lindo's finger, he repeated the Hebrew words," the translation of which we have in another place, "and after such ceremony had taken place, they, the said Esther Mendes Belisario and the said Aaron Mendes Belisario, went out of the room, and the deponent and the said Abraham Jacobs remained there, until the said Esther Mendes Belisario went away, which was soon after, and then they, accompanied by the said Aaron Mendes Belisario, went out of the house together." And he further saith, "that he looks upon and believes the said marriage, as between persons professing the Jewish religion, to be a good and valid marriage; and the deponent knows of several marriages under similar circumstances, which are held and reputed to be good and valid." This is confirmed, I think, exactly as to all circumstances that are stated by Abraham Jacobs, the other witness. Of the other witnesses examined upon Belisario's allegation, some speak to the acquaintance and connexion there is between the parties, respecting which there is no doubt at all; and the other, as to the effect which such a ceremony, which is proved to have passed between them, has by the Jewish laws, and whether it is, by that law, to be considered as a marriage or not.

The first of the witnesses examined is Mr. D'Azevedo: he says, he is reader to the Portuguese Jews' synagogue in the city of London, and is well acquainted with the rites and ceremonies of marriage in the Jews' religion, as handed down by his ancestors. That having read the Hebrew words written in the said first article, which he fully and perfectly understands, he cannot take upon himself to say, whether such words, being repeated by a Jew, a bachelor of the age of thirteen years or upwards, to a Jewess, a spinster of the age of thirteen years or upwards, with an intent to contract matrimony, and, at the same time, delivering to the said Jewess a gold ring, in the presence of two credible witnesses, being also Jews, and the said Jewess freely and voluntarily receiving and accepting the said ring, does or does not make an effectual and valid marriage; nor can he take upon himself to depose, whether or not the same is held among the Jews, or persons professing the Jews' religion, or universally deemed, reputed, and taken to be a good and valid marriage, by the High Priest, Chief Rabbi, or Archisynagogus, and the Rabbies or Priests, his colleagues, and by persons acquainted with the rites and ceremonies of marriages in the Jews' religion;" for the deponent saith, "the repeating the said words in the Hebrew language, and the delivery of the ring in the manner pleaded in the said article,

forms a part of the marriage ceremony among the Jews, and is called the Kedushim, without which it is not a marriage in the Jews' religion; but the deponent cannot say whether or not such ceremony of the Kedushim alone would constitute an effectual marriage; but being incompetent to give an opinion thereon, he saith, so far is he from being satisfied of the validity of such a marriage, that, if he was to be married, he should most certainly conform to the ceremony of a public marriage, lest the Kedushim might be deemed insufficient to invalidate a marriage among the Jews agreeably to their laws." This witness is the son of the late High Priest, and who was so a great many years, and it is allowed that he was certainly a man of great authority and experience. The witness is his son, and he is employed in the synagogue, and expresses himself very doubtful as to it making a complete marriage, and speaking himself of it as being rather a part of the marriage only, than any thing else.

The next witness, is the brother of the last. He describes himself to be a watchmaker, and he says, to the fourteenth article, "that he is a total stranger to the facts pleaded therein; but saith, that if the said facts are true, as therein pleaded; if there was no compulsion used, and the articulate Esther Mendes Belisario, formerly Lindo, received and accepted the ring from the said Aaron Mendes Belisario freely and voluntarily, that such a ceremony, as is pleaded in the said article to have passed between the parties in this cause, is binding on them, and is so far good and valid, as between persons professing the Jewish religion, that they could not, according to the rites and ceremonies of the marriages in the Jews' religion, marry any other person, without being first divorced from the aforesaid marriage, which is called the Kedushim;" but the deponent saith, "that such a marriage as aforesaid is not perfect or complete, for want of the officiating Priest to pass the nuptial benediction on the parties, and the same is liable to be called for proof before the Bethdin, or tribunal before mentioned. But if it should then appear that the parties, who had been so married by the Kedushim, were so married without any compulsion or deceit, and that the witnesses thereto were Jews, such a marriage would, as the deponent verily believes, be held to be good and valid, as binding on the parties."

The third witness, who is called on the same side, is Solomon Mordecai Ish Yemene, who is described as one of the students of the college of the Portuguese Jews. He says, "that while he lived at Hamburgh he filled the office of High Priest of the Portuguese Jews for three years; that he is very well acquainted with the rites and ceremonies of marriage. That if a Jew, being a bachelor, and of the age of thirteen years and upwards, shall seriously, and with an intent to contract matrimony, deliver, in the presence of two credible witnesses, who are respectively Jews, a gold ring, and repeat the words before stated, in the Hebrew tongue, to a Jewess, a spinster and of the age of thirteen years and upwards, and she shall freely and voluntarily receive and accept the said ring, the same is held among the Jews an effectual and valid marriage, conformable to the law of Moses; and he saith, that it is so deemed, and universally reputed and taken to be by the said High Priest, Chief Rabbi, or Archisynagogus, and the Rabbies or Priests, his colleagues, and by all the Jews or persons acquainted with the rites and ceremonies of marriage in the Jews' religion;" and he further saith, "that the before-written Hebrew words are of his, the deponent's own hand-writing,

and are the same as those written in the first article of the said allegation, the translation of which in English is, 'Behold, thou art sanctified unto me with this ring, according to the law of Moses and Israel;' that such ceremony among the Jews is called the Kedushim; that some Jews differ in the translation of the word used, which is, according to one interpretation, 'prepared,' and, according to another, 'sanctified;' but they all agree that such a ceremony is held a good marriage, so much so, that Moses himself could not invalidate it, according to the Mosaic law; and further to the said article he cannot depose, save that the Rabbies do require that the persons between whom such afore-mentioned ceremony of the Kedushim shall have passed, shall afterwards go through the ceremony of the Hupa and the seven blessings, which, according to the rabbinical ceremonies, is the usual way of marrying; but the omission of such latter ceremony does not invalidate the marriage by the Kedushim alone, for such persons are lawful husband and wife, according to the law of Moses, which is the foundation of the Jewish law, and by which the Jews are ruled in all matters of religion."

The last witness examined on this head is Solomon Lyon, who describes himself to be a Rabbi of the German Jewish nation. He says, "that the aforesaid ceremony of the delivery and acceptance of a ring or piece of money and the repeating the Hebrew words, which in English signify, 'Thou shalt be holy to me with this ring, according to the law of Moses and Israel,' is, among the Jews, called the Kedushim, and was instituted by Moses as a law of marriage among Jews; but that since the Rabbies have appointed a further ceremony of marriage called Hupa and the seven blessings, in addition to the Kedushim, the same is mostly observed at the time of marriage of a Jew and Jewess, agreeably to the rabbinical laws, although the omission of the Hupa and the seven blessings cannot invalidate a marriage by Kedushim alone; for the deponent saith, that such last-mentioned marriage, notwithstanding such aforesaid omission, would, according to the law of Moses and the Jewish law, be held effectual and valid."

To the fifth interrogatory, the same witness says, "that, according to the original Jewish law, which was given by Moses, the only ceremony which constitutes marriage is that of the Kedushim, but since that time the Rabbies have added the ceremony of Hupa, as necessary to a Jewish marriage; but even Beth Joseph himself lays it down, that a marriage by Kedushim alone cannot be invalidated, if there is no deception used." Annexed to this allegation given by Mr. Belisario, there is a certificate that was addressed, in the year 1778, by Moses Cohen D'Azevedo, and another Priest to the Elders of the Portuguese nation, and to the High Priest, a man of very great learning in the Jewish law. The certificate is signed by the gentlemen, who, I suppose, were the Bethdin of the time. Now, it appears to me, that this was a very different case from that which is now before the Court. That appears to have been a much more solemn act than this. It is called a contract; and it appears that it was signed by the parties, and signed by two witnesses who were present: therefore there was much more solemnity in that act, than is proved to have passed in the present case; but that which, in my apprehension, completely distinguishes it, is, that the reference made to them was, whether the marriage between those persons was valid, and whether the children born were legitimate? They give it as their opinion that it was valid; that the woman could not

marry without a divorce; that they were cohabiting in venial sin, and that the children were legitimate; the fact being, that those parties were cohabiting, and had children.—That had accordingly, to all intents and purposes, the effect of the Hupa; and the certificate is, that it was valid, although there had not been the Hupa, but that which supplies the place of it; for there had been a cohabitation: therefore, that is a case perfectly different from that now before the Court, where there appears to be no cohabitation or consummation, but the mere declaration of parties joined together, in the way which has been stated, amounting to a Kedushim, and nothing more; and it is not suggested that any other step had been taken, but that of the Kedushim.

The allegation, admitted on behalf of Esther Lindo, recites what is alleged on the part of Mr. Belisario, respecting the act taking place; but it pleads that it was not an effectual marriage, and upon that allegation there have been four witnesses examined.

The first is David Henriques Julian: who says, “that he is one of the Rabbies of the Portuguese Jews Synagogue in the city of London; that there is not a High Priest of that Synagogue; but that the deponent has for seven or eight years last past been one of the Rabbies who fill the office of High Priest, or Archisynagogus; and as such, hath ever since formed one of the tribunal called the Bethdin, which, among the Jews, is the highest authority in Ecclesiastical cases, and consists at present of two chief Rabbies, who are appointed by the Synagogue, and they call in a third Rabbi when they have any case to determine; that, at present, the deponent and Hasday Almosnino are the chief Rabbies so appointed by the said Portuguese Synagogue, of which this deponent is the first.”

He says, “that if a Jew, being a bachelor of the age of thirteen years and upwards, shall seriously, and with an intent to contract marriage, deliver, in the presence of two credible witnesses, who are Jews, a gold ring, and repeat the aforesaid Hebrew words to a Jewess, who being a spinster, of the age of thirteen years and upwards, and she shall freely and voluntarily receive and accept the said ring, in the manner, as is stated in the recital, from the first article of the said allegation given in and admitted on the part and behalf of the said Aaron Mendes Belisario, the same would not be called a marriage amongst the Jews, but only a betrothment; the effect of which is, that she cannot by the rites and ceremonies of the Jews, marry any other man than the person to whom she is so betrothed, unless she is freed from such betrothment by his giving her a divorce, which he has power to do when he pleases; and the Jewess so betrothed by the Kedushim alone, is complete mistress of her own property, and may dispose thereof in whatever manner she pleases; and the Jew to whom she is so betrothed, is not obliged to maintain or provide for her, till she has gone through the full ceremony of marriage with the said Jew; and if she should die after being so betrothed, or having gone through the ceremony of the Kedushim alone in manner as aforesaid, he, the said Jew, would have no right to any part of her property; neither would she, if the Jew was to die, be entitled to any dowry, or other part of his property: and he further saith, that the ceremony essential to, and which constitutes an effectual, valid, and legal marriage among Jews, is, that a formal contract in the Hebrew language must be entered into by the bridegroom, with the bride according to the rites and ceremonies of the Jews, and the rules of the Jewish con-

gregation, to which the parties belong, which is drawn by the Priest or Minister who marries them, and must be signed by the bridegroom and two witnesses before the ceremony of marriage, and must also be entered and registered in a certain book kept for that purpose in the Synagogue, or by the Priest or Minister of such congregation, and the said entry must also be signed by the bridegroom and two witnesses; after which the original contract is always delivered to the bride or other relations; that by such contract the Jew binds himself to maintain, clothe, honour, and behave with conjugal duty towards the Jewess his wife." But the deponent saith, "that if a Jew and Jewess, after having given and received the Kedushim in manner as aforesaid, and such Jew was afterwards to say, in the presence of two witnesses respectively Jews, that he was going to have a connexion with such Jewess in the name of marriage, and then retired and had carnal knowledge of such Jewess, the deponent believes that, in such case, it would be held a good and valid marriage between such Jew and Jewess, according to the rites and ceremonies of the Jews, and would be so pronounced to be by the Bethdin; but the deponent does not remember any such case, and only states the same as his opinion." He says, to the eleventh interrogatory, that the children of a Jew and Jewess, who have been by their parents declared to be their children, would, by the law of Moses, inherit the property of their parents, as well as children born under the most solemn form of marriage, if even the Kedushim, or any form of marriage, had never passed between their parents." And he further answers, "that, supposing a Jewess, who had received a ring under the Kedushim, shall carnally connect herself with any other man, than him who gave her such ring, she would be considered an adulteress, according to the Jewish law; and if a man, being a Jew, should commit a rape on a Jewess who had so received a ring, he would, according to the Jewish law, be punished with death; as would a Jew who had committed a rape on his neighbour's wife." Mr. Almosnino, the other Rabbi, deposes in the same manner, that it would not constitute a valid marriage, but only a betrothment; and the Jewess so betrothed remains mistress of her own property, and may dispose of it in any way she pleases; and that if such Jewess should die, after being so betrothed, the Jew has no right to her property, or any part of it."

The third witness is Isaac Delgado, who fully confirms what the other two witnesses have said with respect to the betrothment; and Mr. Ish Yemene, says, to the third interrogatory, "that the property of a Jewess is inheritable by her relations, and not by the man; but that the husband is heir to the married woman." And to the fourth interrogatory he says, "that the relations of a woman betrothed are, by the Jewish law, bound to pay the burial expenses; and by the like law, those of a married woman are to be paid by the husband."

It was mentioned by the counsel, that there were considerable contradictions in the evidence given by those witnesses.—I do not observe any that are material; they all say, "that the Kedushim is such a betrothment, or such a contract entered into between the parties, as cannot be dissolved without a divorce; that the woman, if she should connect herself with another man, would be an adulteress, and that so far it is to be considered as a marriage:" but they say, "it has none of the effects by which the property is conveyed; that a man has no right to

the property of the betrothed woman; that she may do what she will with her property; and if she dies it will not go to him, but to her relations."

Thus the evidence stood upon the first hearing; and then the Judge did, after hearing the argument, not without giving an opportunity for the counsel to object, but for the purpose of information, direct that certain questions should be propounded by the Registrar to the Bethdin; and they, being delivered to the Bethdin, were likewise delivered to the Proctor for the adverse party; and he brought in answers given by two of the persons who were witnesses for his party; and before the Judge pronounced sentence, they were admitted by consent on both sides; both the answers of the Bethdin, and the two other persons also.

Respecting the questions put to them, the first is, "Whether it is admitted that Beth Joseph, who is proved in this cause to be one of the principal guides of the Jewish Portuguese Church, has laid it down that the Kedushim alone cannot be invalidated?" That means, as I understand it, whether, if that ceremony has passed, and no other, it will require a divorce to set the party at liberty? The answer they have all given is, that it cannot without a divorce. So the witnesses, who were examined on the part of Miss Lindo, say, because they say, that it is only a betrothment, and not a marriage, although it has that effect.

80. The next question is, "Whether the assertion of Maimonides, as cited by Mr. Selden in his *Uxor Ebraica*, b. 2. c. 1, where it is declared, 'that the woman who has received Kedushim is verè uxor, truly a wife, although consummation hath not passed,' is an assertion without foundation?" Upon that they differ: the persons who compose the Bethdin say, "that the words, that Mr. Selden has quoted, are not applicable to a wife only, but they are applicable to a woman also who is only betrothed, as well as married." The other two contend that it signifies a wife only. It seems to be a dispute merely about words, because Mr. Ish Yemene goes on and says, "that the Hupa, as well as the Kedushim, is necessary to make a complete man and wife;" for he says, "It is afterwards required, that such Jew and Jewess shall conform to the Rabbinical ceremony." That appears to be necessary for every thing, even for the inheritance. And he further says, "If a man, being a Jew, obliges himself to give his daughter a marriage portion, and she should take Kedushim, the man to whom she so becomes betrothed, could not recover such portion, according to the Jewish law, unless such obligation should be given to him." And again, Maimonides says, "the Hupa is necessary;" and Beth Joseph says the same. And it appears that the Hupa, after Kedushim, makes a perfect marriage. But Mr. Ish Yemene says, "the want of the Hupa does not invalidate the marriage in the least;" and it is the opinion of Solomon Lyon, "that the Hupa is of no effect alone, but the Kedushim and Hupa together complete the marriage." In that respect they ultimately agree, I think, although they call Kedushim a marriage, it is not perfect without the Hupa, which is necessary to entitle the man to the property.

• Another question proposed is, "whether a man, who has given Kedushim, has not a right, acquired thereby, to call upon the woman who has accepted it, to submit to conjugal embraces? And whether the woman, who has received the same, is not bound, in conscience and in law, to submit thereto when duly called upon?" To this the Bethdin answer in this manner: they say, "the right the man hath acquired on the wo-

man he hath betrothed is, that he can demand of her to prepare herself for being admitted to the matrimonial state, allowing her a certain period of time for the purpose, and when that period is expired, it is expected that she will surrender herself up to enter the Hupa, which constitutes marriage, but even then she is not bound in conscience or in law to submit thereto; the measures taken in case of non-compliance are, that she will be called before the tribunal, and interrogated, why she doth not fulfil her marriage promise to that man? If she says that her non-compliance proceeds from aversion, saying, 'she detests that man,' then he is ordered immediately to give her divorce; and were he not to conform himself to the lawful mandate of the tribunal, he would be compelled to it; but if she alleges a frivolous and vexatious excuse, the tribunal administers to her salutary advice; and if that proves ineffectual, she is daily called out in the seminaries and synagogues for four successive weeks; and if she remains intractable, at the expiration of a twelvemonth, he will be compelled to divorce her."

"This is the opinion of Rabbi Isaac Alphassi, the first of the three chief guides, upon whose authority we determine all religious matters. Maimonides, who is the second authority of this nature, says the same with other Jewish doctors, some contemporary, and others prior and subsequent to the said Alphassi and Maimonides; but Raburn Ashur, who is the third authority in rank, his son, and the author of the Beth Joseph, with some others, differ, and say, that when a woman will not comply to perform what she did engage herself to, the man cannot be compelled to divorce her, but merely requested to it; but yet none say, that coercive measures can be made use of to compel her to enter the matrimonial state." To the same question, "Whether a man, who has given Kedushim, has a right acquired thereby to call upon the woman, who has accepted it, to submit to conjugal embraces, and whether the woman, who has received the same, is not bound in conscience and in law to submit thereto, when duly called upon?" Mr. Ish Yemene says, "That a man, who has given Kedushim, has power and force acquired by the Kedushim to call on his spouse to come to his house, to be at his command; and he has not only a right to call her to his house, to be under his command, but also the man is bound, by our Rabbies, to bring her to his house in the time above mentioned; and if he has not brought her to his house in the time above mentioned, our learned men compel him to maintain her, though she is not in his house, it being his fault." He then adds, "all the above is clear by the law, as it is declared in the Gemara treatise of Ketubot, fol. 63. The woman who rebels against her husband in conjugal points, let her be proclaimed four Saturdays in the synagogue, and the Bethdin ought to send her a message to let her know, that if she does not within the four weeks submit herself to her husband's command, though her dower be very considerable, she shall lose the whole, as well the betrothed as the wife;" for this he quotes Maimonides, Raburn Ashur, and Tur; and he adds, that "Beth Joseph further says, 'that even after the warning and forfeiting her whole dower, it is at the husband's option to give her *Guet*, but he can never be compelled.'"

Solomon Lyon says, in general terms, in answer to the fourth question, "He certainly has a right to demand his wife, and she is obliged to comply, both in conscience and law, as is fully contained in the Gemara de Ketubot, fol. 59." This they have given as their private

opinion; for in truth it is no more. Of the other three, two are in office to execute the office of High Priest, and the other is called in by them to determine any case that comes before that tribunal. They give a contrary opinion, and expressly say, "that if a woman, after Kedushim, has left her husband, and if she persists in refusing to return to her husband, whether it is for a solid or a frivolous reason, the Bethdin will order and compel the man to give a divorce."

The general result of the evidence is this; there has been what they call, I think, a complete Kedushim between the parties; that Kedushim, as they all prove, will, in order to dissolve it, and in order to give the woman a power to marry again, need a divorce; but it does not of itself create a perfect marriage, because it does not give the husband the rights of marriage; for they all agree, and there is no contradiction whatever, that after the Kedushim is given, the wife retains her rights, she has a power over her own property as much as before, and the husband has no power over it at all.

With respect to the other point, whether the husband can be compelled to release the woman, and give her an authority to part, upon that they differ. But the Bethdin, the persons to whom the application must be made to carry it into effect, say, "that if a wife persists in refusing to return to her husband, the husband may be compelled to give a divorce." In what light then does this woman appear? What is her state and condition?—Is she a perfect wife? No, they all say. Has the husband acquired the civil rights of marriage? No, none of them; they all prove that. Is it possible then for this Court to make a return to the Court of Chancery, and say, that this person is now the wife of Mr. Belisario, as he has claimed her to be; when it is proved that he has not a right to a penny of her fortune, and that she has a right to dispose of it? That if she was to die, he would have no right at all.

What can the Court do then? Can the Court order the Hupa? That would be strange indeed, for the Ecclesiastical Court to be carrying into execution a marriage between two Jews. Can the Bethdin do it? The Bethdin say no. Why does he not try the Bethdin? The Kedushim was given in 1793, and more than three years has elapsed since. Has there been any application to the Synagogue, which, they say, is necessary to complete the marriage, to give him the collective rights of the husband? None. It has been thrown out, by the counsel, that there is an injunction which would prevent her marrying. That I cannot tell. All that the Court of Chancery has done is, to prevent this man from having access to her, or writing letters to her, to prevent him from entering into a contract of marriage. Whether it would prevent them from applying to be admitted to the Hupa, I cannot tell; but certain it is upon all the evidence, that without that ceremony, without the Hupa, they are not perfect man and wife. As I have already stated, the question is not whether Miss Lindo is now at liberty to marry any man she pleases, but whether she is the wife of Aaron Mendes Belisario or not? I think it is clear, from the evidence, that she is not; that the ceremony which has passed, although it prevents her from marrying any other man until a divorce is given, does not give him any authority over her fortune, or person. A man cannot be the husband of a woman, by the law of England, without having the civil rights, which he has not; and therefore, under all the circumstances, I am of opinion, that the sentence given by the Judge of the Consistory Court is perfectly right, and I shall confirm it.

HODGKINSON, falsely called WILKIE'v. WILKIE.—p. 262.

In nullity, by *reason of minority, and want of consent of the parent*,—what consent required. Consent, once given, *how to be retracted*.

ELWES v. ELWES.—p. 269.

Divorce by reason of adultery of the wife, decreed.—Objections to the evidence overruled.

THIS was a case of divorce, by reason of adultery of the wife, in which the merits of the case, and the objections arising on the evidence, are discussed at length by the Court.

JUDGMENT.

SIR WILLIAM SCOTT.

This is a proceeding for a separation, by reason of adultery, instituted by John Elwes, Esq. against his wife. The marriage took place in 1789, the parties cohabited together, as it should appear, upon terms of matrimonial affection, at least during the latter part of their joint residence, until September 1793, when cohabitation ceased. It was some time after that the cause commenced in this Court. Various pleas have been given in—a libel on the part of the complainant: A defensive plea on the part of Mrs. Elwes, a plea stating a verdict which has been obtained in an action at common law, two pleas exceptive to the credit of witnesses on each side, and one allegation restrictive of the credit of one witness, examined on the part of Mrs. Elwes, whose credit had been impeached.

The pleas have been thus numerous; many witnesses have been examined; and the cause has been argued with much zeal and industry. The Court has been called upon, by more than one admonition, to apply much caution in the determination of this cause. I hope and trust, that the opinions which I have occasion to deliver in cases of this kind, are in general formed with due deliberation, and a sufficient attention to the obligations of that office which I happen to fill. Having said this, I must add, that in very few cases have I had less hesitation and fluctuation of opinion, than in the present. It appears to me, that the real merits of the question reside in few particulars, and that these particulars are not liable to much serious doubt or nice observation, and that they lead to a conclusion which resides at no great distance from such premises. There are many parts of the case which unquestionably are pretty remote, but those parts, perhaps, I shall not find it necessary to travel into with any minute exactness. The persons, with whom Mrs. Elwes stands charged, are two, a Mr. Egerton, and a Mr. Harvey, persons, it should seem, bred to the law, living in different law societies. There are several articles of the libel, given on the part of Mr. Elwes, which state the commencement and progress of the acquaintance which this lady had with these two persons from the year 1791, and which lasted with much general, and, it is contended, with much suspicious familiarity, till the time when he separated from his wife. The latter parts of the libel state, what in our technical language are called ap-

proximate facts, or facts from which the legal conclusion of adultery is immediately deducible.

Upon this libel four persons have been examined, and the whole support of the accusation is comprized within their testimony; for if they do not prove sufficient, there is an end of the charge, nothing farther arises; on the other hand, if they prove sufficient, they will establish the legal conclusion, unless the legal effect of their testimony is taken off by something which either destroys it directly by contradiction, or which depreciates it by diminution of the credit of these witnesses, or defeats it indirectly by the opposition of other facts, consistent with these in point of truth, but leading to a different legal conclusion; such as a connivance, and still more an active seduction on the part of the husband, before the injury was committed, or a condonation of it, after it came to his knowledge. Three of the witnesses are examined to general familiarities and specific facts; one to general familiarity only.

452. It has been truly observed that the libel goes a considerable way beyond the proofs; facts are charged which can hardly be said to be proved at all in the manner they are stated in the libel; and there are other facts which, upon the evidence, turn out to be slight and insignificant. Having said this, I may add it is no more than may be said in almost every case of this nature. The complainant states his case from information and report, and in these matters, of mere general circumstance and habit, there is much room for misapprehension, and for over-coloured description. It is a matter of daily observation in such cases, that circumstances find their way into the libel, which, upon further examination, do not carry with them much serious importance; but it is a different question, whether there is not sufficient proved, upon this head, to excite the alarm of the Court, and to prepare it for the reception of evidence that may be more directly demonstrative of guilt. The general evidence, I think, has that effect; and I state the result of it without exaggeration, when I say that, to my mind, the following particulars seem to be sufficiently established. That Mrs. Elwes, a married lady, did admit these two young men to her society, in a manner that is not free from suspicion and censure. They were not absolutely unknown to her husband, but they had no intimate acquaintance with him; they were rarely in his company; their society was never cultivated in any degree by him, nor was it in any manner recommended by him to his wife. However, in his absence, they visited her with great frequency and familiarity: it appears that they were each of them separate and alone with her in the absence of the husband; that they breakfasted and 12. + dined with her alone; that she occasionally called upon them in their Chambers; and that, when she met them in the street, she got out of her carriage, and ordered it to wait, or dismissed it entirely, and continued to walk with them; that she rode out with them, and they waited for 3. + her at the end of the street, and that she ordered her servants to conceal from her husband their having been in her society; that she paid the turnpikes herself, or ordered them to be paid, in order to carry on the deception; in short, that she passed much of her time with them, not only unknown to her husband, but with an anxiety that it should continue *unknown* to him, and with a degree of secrecy and clandestinity respecting him, which, if it is not criminal in itself, is so closely connected with such habits, as to give a high degree of credibility to any thing more grossly criminal, that is stated to be the result.)

Having taken this general view of the evidence of the sort of familiarity which subsisted between these gentlemen and this lady, I cannot but think that it goes much beyond those limits which even the forms of the world allow in such cases; and if a wife will form connections of this nature, and will cultivate them in this manner, I cannot think she has much right to complain of the want of candour in her husband, or in the world, if suspicions are entertained extremely to her disadvantage. With respect to the freedom regarding these gentlemen, which I think no man can state to be consistent with the duties of sincerity towards the husband, and with those duties of caution and prudence with respect to other men, which the character of a wife, even in the most relaxed apprehensions, imposes upon a married woman,—enough is proved, in this stage of the case, to render highly credible any evidence of a more substantive nature which I may find in the progress of the cause. Some contradictions have been attempted to be pointed out in the evidence; but they are not of that nature which in any degree destroys the proper harmony of the witnesses. 469.

The evidence is comprised in the examinations taken upon five articles of the libel: I shall only state particularly those which are supported by concurrent testimony. The eleventh, which stands upon the single evidence of Collicott, and in which an anachronism has been pointed out, is to this effect: "That one evening, about seven o'clock, towards the end of the year 1792, as he was over the stables belonging to his master's house, he looked through the window into the back parlour, and he then saw, by the light of a candle, Sarah Elwes and Mr. Egerton alone together in the said room; that he saw Mr. Egerton kiss his mistress several times, and take other indecent familiarities with her; that he continued looking at them for about five minutes, and then went away." The next article stands likewise upon his single testimony; for he says, "about five in the evening of the 18th of August 1794, he went up into the same room over the stables, and that he very plainly saw Mr. Harvey sitting upon a sofa in the room, and his mistress sitting in a chair close to him, leaning her head towards him, and that *apparently* she kissed him several times: he mentions several other acts of gross familiarity; that he continued his observations, and saw Mr. Harvey and his mistress close together on the sofa; that she kissed him several times, and that they continued upon the sofa for some minutes." I suppose, on this evidence, I need say no more than that, if it is credited, the facts are of a nature from whence the legal presumption of adultery may be inferred.

My observation, however, ought particularly to be directed to those facts on which I have the benefit of concurrent testimony, viz., on the thirteenth, fourteenth, and fifteenth articles of the libel. Upon the thirteenth article Collicott deposes, that "on the 21st of August 1793, in the morning, as he thinks, suspecting that there was somebody with his mistress, he went up into the room over the stables, and saw Mr. Harvey and his mistress sitting close together on the sofa; he saw them kiss each other several times, and his mistress sit on Mr. Harvey's knee; that he continued looking at them for about twenty minutes; and after quitting the place for some minutes, he returned again, and saw them still in the same room alone together," when he saw a great deal more familiarity, which it is not necessary for me to repeat. This witness is supported by the testimony of John Taylor upon this article, and he de-

poses, that "on that day of the month of August, as he was in the stables, he was called up stairs by the groom," a circumstance which is adverted to by the other witness; "that he then saw Mr. Harvey and Mrs. Elwes together alone in the drawing-room, and Mr. Harvey lying on the sofa therein, and Mrs. Elwes sitting in a chair close to him; that he saw them kiss each other, and Mr. Harvey laid his hand upon her neck; that being under the necessity of getting his carriage ready, he went away."

Now, with respect to the contradictions that counsel have endeavoured to point out in this evidence, it has been urged that one of the witnesses states, that it was, as he best recollects, in the morning; the other, that it was in the evening; but I think both these witnesses may speak true, speaking at this distance of time, and with a want of precision which they both avow. The difference, in that respect, will not materially affect the substance of their testimony. It is said, that Taylor was not there on the second occasion. Taylor is certainly not examined upon that article of the libel, though he is vouched as being present; whether there is a mistake in that respect, I do not know; but I am satisfied upon the evidence that they were present at one of the times stated in one of these articles in society together, and that they did see what they jointly depose.

The 14th article states a subsequent fact to have passed when Collicott and Taylor were together, to which the former deposes, that "on the 2d of September, being in the stables, he went up stairs, and plainly saw his mistress sitting upon a gentleman's knee on a sofa, and saw him kiss her several times, and pull her about, and take other freedoms with her; that he called up his fellow witness, John Taylor, and a Mr. Wild, and that they all saw the familiarities described." John Taylor is examined upon this article, and deposes, "that he looked into the same room, which is the back drawing-room, that he there saw them alone together, that he saw them kiss each other several times, and Mr. Egerton take Mrs. Elwes round the waist, and that after being some minutes together, they went out of the room."

It was observed, that the facts, to which these witnesses depose, are not precisely and identically the same; that the situation and attitudes of the parties, as related by one of the witnesses, are different as related by the other. It seems a sufficient answer to that to observe, that the parties were a considerable time together; that the observations were made at different intervals, and that all the attitudes spoken of are *ejusdem generis*, and such as lead to a conclusion, that the facts followed, to which such gross familiarities are natural preludes: The variations are no other than may be expected to take place in such an interview. The last criminal fact is stated on the fifteenth article, which is deposed to by Collicott, supported by another witness of the name of Lings. He says, "that, on the 15th of September, Mr. Elwes set off in his carriage for his country house, leaving his wife then ill in bed; that about ten minutes after his master was gone, Elizabeth Plumb went out, and remained for about ten minutes, and that half an hour afterwards, he being in the street, saw Mr. Harvey come to the door, who was let in by some person, without either ringing the bell or knocking; that he went to the room over the stables, and from this station his observations were of a similar nature to those already noticed by the Court." In corroboration of this, Ann Lings is examined, and deposes, "that between twelve and

one o'clock on Sunday the 15th of September, her master set off from his house in London; that Williams went out of the house and returned; that witness went into the stables, being called by Collicott; that she saw very plainly Mr. Harvey and her mistress sitting alone in the room close to each other, Mr. Harvey having his hand either round her waist or neck, and saw those familiarities pass between them repeatedly."

Now, looking at this evidence of Collicott and Taylor, and admitting the possibility of a mistake, in one of those witnesses, with respect to the time of day and evidence, I should surely carry that caution, which has been so strongly recommended to me, to a degree of absurd and unreasonable scrupulosity, if I did not conceive that they necessarily drew with them the conclusion that these parties were living in a criminal intercourse with each other. I suppose, no man, who hears this evidence stated, and gives credit to it, can think that I ought to stop short where the witnesses stop, and not go the length of supposing that something passed, which the witnesses have not literally described. Upon the effect of the evidence no sufficient question can be raised. Two exceptions, however, have been taken to its sufficiency: First, that the witnesses themselves do not go the length of venturing to state, that the criminal fact did take place. Secondly, that a witness is vouched, as having been present upon several of these occasions, a Mr. Wild, who has not been examined in the cause.

With respect to the first objection, I take it to be a position perfectly new, that the Court is bound by the defective apprehension of the witnesses. It is the business of the witnesses to relate facts, and not to draw inferences: that is the business of the Court; and it would be a monstrous proposition indeed to assert, that the merits of a case of this nature, are to depend, not upon the narrative, but upon the logic of the witnesses. Undoubtedly the libel must plead the conclusion of adultery, because unless it is pleaded, *non constat* that it may not be an action for mere solicitation of chastity." But if the party does aver it, and he proves only proximate acts, he proves unquestionably the whole of his averment in the libel.—If a witness stops short, and declines or omits to state his belief of the ultimate consummation of the act, it is very true that the Court is put upon its guard to see whether there is any ground for a scepticism of that nature: but if the Court sees that the facts are of such a nature, as will justifiably, and almost necessarily, lead to the conclusion, the scepticism of the witness, even if it really exists, signifies nothing. The Court, representing the law, draws that inference which the proximate acts unavoidably lead to; and therefore if the witnesses, even in this case, hesitated and paused about drawing that conclusion, I should not conceive myself in any degree limited by their hesitation upon that subject. (a) The fact however is this, the witnesses are not examined at all as to their belief: An interrogatory is simply put to

(a) The nature of the evidence, on which cases of this description have been universally considered, is stated by Commentators in the following terms:—*Et ratio est, quia, cum adulterium sit ex illis criminibus, quæ in abdito loco et omnino occulto admittuntur, est difficillimum probare, nec vere probari potest, sed ex probationibus petitis et presumptionibus concluditur. Unde fit, ut non tam exactæ probationes petendæ sunt, ac in aliis criminibus, quæ oculis patent, palamque perpetrantur.*

Sed non sufficit quæcumque suspicio probabilis, sed desideratur suspicio violenta, quia hæc sufficit ad condemnandum. Est tamen cognitum certitudine morali, et ex urgenti

them, whether they will take upon themselves to swear positively that the fact of adultery has been committed? They conceiving, I presume, that they were bound to speak to their observation, and not to their belief, have, in answer to that question, simply deposed—that they cannot take upon themselves positively to swear that the fact of adultery had been committed; meaning thereby nothing more than this, that no fact of that kind had passed under the observations that they had the opportunity of making.

See The other objection is; that a third witness is vouched, who is not^{305.} produced and examined in the cause.—In the first place, it is by no means necessary that every person, who was present at a transaction, should be produced by the party who prefers the charge: Even the cautious jealousy of our law establishes facts of this kind by the testimony of two witnesses at the utmost. That there could be any intention to dissemble the presence of this witness, or to withdraw him from the knowledge of the court, cannot be suggested; because he is vouched, by name, by the witnesses who are examined; and I cannot help thinking that it is an observation, which does not merit to be treated with that degree of slight which was thrown upon it, that it was perfectly within the power of the other party to have produced this witness, in support of their allegation of a conspiracy,—seeing that this witness was present at the transaction,—seeing, that he is so described to be in the presence of these witnesses,—seeing, that if these transactions did not pass, in the manner they have been described, that Mr. Wild could have given a most effectual contradiction; for although I admit that originally it was not necessary, nor in any degree proper, that this witness, Wild, should have been produced on the part of the defendant, yet in these circumstances I cannot but feel, that there was every call of propriety and prudence, if they are sincere in the belief that these transactions did not pass in the way they are stated, to produce Mr. Wild for the purpose of giving that contradiction. To say that it would be giving the other party the benefit of a cross examination is, in other words, in my apprehension, to say only this,—that there was reason to be afraid of the possible disclosure of the whole case, because if the case was what they state, that this was mere fabrication and conspiracy, to be sure nothing which Wild could depose, either in chief, or upon interrogatories, could be attended with any considerable degree of hazard.

I am of opinion therefore that there is no ground, in point of law, to object to the sufficiency of evidence. These witnesses depose with satisfactory precision as to time; they depose with sufficient harmony with respect to circumstances, and the effect of their testimony is complete. I am of opinion then, that unless there are objections to the sufficiency

presumptione, quæ virum prudentissimum ad judicandum adulterium induceret. Sanchez, lib. x. disp. 12. p. 374.

Est siquidem fornicatio et adulterium de genere horum delictorum quæ clam et abditè solent perpetrari, ut vix de iis certo constare vel probatio eorum indubitata adduci queat—Quare in occultis ejusmodi delictis probatio conjectura pro concludenti habetur—Neque criminis certitudo alia requiritur quam quæ haberi potest. Carpzovius, Definit. Eccl. lib. ii. tit. 12. Def. 209.

Non enim potest verè dici feminam adulterii ream esse ex sola suspiciōe, ita ut suspicio illa pro crimine adsumatur; bene tamen pro judicio et argumento adulterii, ex quo vehementer suspecta sit, eaque suspicio violenter, arbitrio boni viri, vel indubitata existimetur. Ex his vero præsumptionibus, quandoque fertur in civilibus diffinitiva et ordinaria sententia quandoque etiam in criminalibus. Covarruvias, tom. i. p. 197.

of the witnesses themselves, the evidence cannot be pronounced to be, in any view of it, deficient. Now is there, or is there not, any ground, in point of fact, upon which reasonable objections can be constructed to the sufficiency of these witnesses? If such objections exist, they must arise either out of their general character, or out of their depositions, or from their conduct on this particular transaction.

With respect to the general character of the witnesses in this case I must observe, that they are all three of them totally unimpeached: they stand before the Court with reputations undiminished in point of general credit; and, upon those grounds are entitled to a favourable reception, as any witness who appears in any Court whatever. To two of these witnesses, Taylor and Lings, nothing is imputed, as affecting their general character; and nothing arises from the other two sources of possible discredit, either from their depositions, or their particular conduct in this transaction; for, as to the declaration, made by Collicott, respecting himself and Taylor, supposing that declaration to be established, it may be very good evidence to affect himself, but can in no degree, and by no fairness of conclusion, in any manner, implicate the other.

The only person then to whom attention has been called, in the way of an unfavourable attack upon the weight of his testimony, is the witness Collicott, and to his evidence various exceptions have been taken. It is said that he deposes very strongly in chief, but that much of the force and effect of his deposition is invalidated by concessions and retractions upon the interrogatories. Now, looking at the evidence which he has given in these two different forms, I am not by any means prepared to say, that he has deposed in a malignant and uncandid manner. It is very true, that upon the libel, he omits some circumstances which are stated upon the interrogatories; but this is no more than happens, and usually happens, according to the mode in which our examinations are taken. The attention of the witness is naturally elicited by the circumstances stated in the allegation; to these he adverts, and frequently neglects or declines travelling into other occurrences than those particularly stated—but that these circumstances were dissembled with any malignant intent, I cannot believe; because he expressly disclaims, in the history which he gives of the behaviour of the parties towards each other, upon these occasions, observations of any thing indecent or immodest. He says that he did not, at these particular times, see any thing inconsistent with the duty of Mrs. Elwes.

The second objection is undoubtedly of a more forcible nature, that he has made declarations of a very alarming sort; that he has declared, that he would bear testimony against his mistress for the purpose of ruining her; that he had received, or been promised to receive, a considerable bribe for this purpose; that he was actuated by motives of malignity, as well as interest, nay, that he complained of her want of generosity: that, if she had acted in a different manner towards him; he would have been ready to give a very different testimony. Now I cannot, in my place, but notice that this evidence has been very unfairly introduced. The allegation was admitted upon the express ground, that these declarations had been made subsequent to the institution of this suit. If they had *not* been so made, unquestionably they ought to have been pleaded before, because they are matters not so directly arising out of his deposition, as they are destructive of his general credit. It was perfectly within the knowledge of one of the parties that this man was to be pro-

duced, and to what articles he was to be examined; and if he made these declarations within the knowledge of the person proceeded against, surely the consequence ought to have been that she should have pleaded these facts before, and not have waited till after the publication of this matter; it being of that nature, which, in its general effect, is constantly and properly so pleaded.

It was more incumbent in this case that this allegation should have been given at that time, because it connects itself with the suggestion of a conspiracy. It is pleaded, in the defensive allegation, of Mrs. Elwes, that the whole of this charge is a malignant fabrication; it would then again have corresponded with her general course of defence, and fortified and proved, in the strongest manner, the general plea, that the whole of the evidence was the fruit and result of this wicked combination. However, the fact is, that it is not produced until long after the publication of the evidence. When I look at the witnesses, who are examined in support of it, I find that Plumb, and another witness, expressly state that the fact was known to them, of these declarations being made, long before the institution of the suit. The declarations were made at the time they lived together in the service of the parties. The other witness, Dowling, speaks in a similar manner with respect to most of the declarations; but, she says, "that she does not know, whether, before the examination of Collicott, in the action at common law, or in this case, he did declare, though she thinks it was since the separation, at her own lodgings, that he knew no harm of his mistress, and that if she had been generous, he would not have troubled his head about the matter."

Then all the declarations that are, in any manner, proved to have been subsequent to this suit, are proved in the loosest way,—merely common declarations that he said "he knew no harm of his mistress, and that if she had been generous, he would not have interfered in it." In the first place, it is to be observed he has been interrogated, and he admits that he did say this, "that if his mistress had treated her servants with kindness, they would probably not have troubled their heads about the matter." Now, it is not at all unlikely that this declaration, which is very far short of the other, might in the apprehension of the witness, have been mistaken for it, and that he had said,—"that he should not have entered into the business at all, if his mistress had conducted herself, in the usual manner, towards her servants."

The next declaration,—that he knew no harm of her, he positively disclaims, and swears he never did, upon any occasion, make a declaration to that effect. Then I have the oath of one witness against the oath of the other. It is credit against credit, and it is for me to determine, whether, upon the single credit of this witness, I am to pronounce that this man has contradicted that deposition which he has given most solemnly upon his oath. The remaining declarations, which are stated, are certainly of a very malignant and of a very alarming aspect. But if I look either to the substance of the declarations, or all the conduct of the parties respecting them, it is quite incredible that such should have been made. He is first represented to have stated, that he came into the service of the family without a character: The direct contrary of this is proved in the most complete manner; and that he had a character, is sustained by the declaration of his former master. Why should a man discredit himself, by a falsehood of this species; or why should he represent himself coming

without recommendation, when he came with the usual recommendation of a servant? That he should misrepresent himself, and vilify his own history, must be thought a little extraordinary, and an unnatural circumstance.

Next, with respect to these declarations, let me look at the conduct of the parties, and, first, to the conduct of this man;—that he should, in a public and unreserved manner, relative to the history of a suit, which was at that time pending, or likely to be instituted in a court of law, state himself to be a person guilty of the most malignant and corrupt falsehoods; that he should put it in the power of every person, who heard these declarations, to counteract them; that he should do all this, is, upon the face of it, not consistent with the common course of human behaviour.

On the other hand let me view the conduct of the parties to whom these conversations are addressed;—and particularly of Mrs. Plumb,—a person to whom I suppose I do no injury, when I state, that she bears a very high degree of attachment to all the interests of her mistress; that she has all the zeal, that a favourite servant may be supposed to have, for the reputation of that mistress; and that she has the same regard for common justice which the human mind, not warped by any selfish interest at that time acting upon it, naturally feels. This woman and the other witnesses associated with her, hear these declarations repeatedly made to the disadvantage of a lady, whom they know to be innocent; and, in whose cause, they feel all that animation which particular attachment as well as general justice inspires. They hear all this, and yet keep it a secret totally locked up in their own breasts, and make no communication of it to the party, who might have been most effectually benefited. And although it was perfectly known, that this man was to be considered as the cardinal witness in support of this prosecution, no communication is made to their mistress that his testimony was capable of being effectually destroyed. It remains locked up, an idle and insignificant secret, in the breasts of those three individuals, never communicated till in a very late stage of this suit. I am called on, then, to decide between the conduct of Mrs. Plumb, and the testimony of Mrs. Plumb, and I have no difficulty in deciding to which I shall adhere. I am of opinion, that these declarations could not have passed in the manner in which she has described them.

But, it is said, that all this may be a conspiracy; and how is the innocence of persons to be protected against the danger of such a conspiracy.—A conspiracy, however, is not to be presumed upon the ground of mere possibility. If witnesses come unimpeached in point of general integrity, if they depose with characters of fairness in their particular narrations, the facts must be received, or there is an end of all judicial inquiry. Human prudence has done its utmost, has done all that it is capable of doing, in giving every security that can be afforded to individuals. Still it is asserted, here is direct evidence of the fact of a conspiracy.

Now, who are the conspirators in this case? If the facts are established, upon the evidence of witnesses, upon whom no such taint of conspiracy lies,—it perhaps would not signify very much, even if it could be shown, by any probability, that a conspiracy existed any where else. But what are the proofs upon which the existence of this conspiracy is affirmed? Why, it amounts to this, Mr. Elwes was dissatisfied with

the conduct of his wife, and expressed his determination to dismiss her in terms strong and intemperate. Possibly this may be true to some extent, and it is not unnatural that he should have felt so, if the behaviour of his wife was that, which the conclusion to be deduced from the evidence in this case leads me to decide it was; it is not, I say, unnatural that he should feel a great disinclination to the society of his wife, and express it in forcible, and, perhaps, in unmeasured terms. But that he acted upon those ideas and declarations in any manner towards the corruption of his wife has not I think been seriously argued. It has been said there is some evidence of subornation of witnesses. The only witness produced to prove it, stands contradicted on the evidence of Mr. Haywood, and looking at the conduct of the witness Gray, and the description he has given of himself in the business, I think I should pay a very ill compliment to the integrity of all the witnesses examined in the cause, if I hesitated for a moment in deciding, that his testimony is incapable of prejudicing any other individual than himself. He has, with great propriety, been abandoned by almost common consent in the discussion of this cause.

Something has been said about the verdict, which took place in the court of common law, that there is reason to suppose that it was obtained by a collusion between the parties. (a) As the judgment of this Court

(a) An allegation was given in, responsive to the first article of an allegation, admitted on the part of John Elwes, Esq. which pleaded "the verdict of the Court of Common Law," alleging ["that the verdict was obtained on the oath of one single witness, who did not even swear to any act of adultery, and that the said witness was still in the service of the party." *Rejected under the observations of the Court, as infra.*—"That many persons were subpoenaed by George Daniel Harvey, Esq. the defendant, who were in waiting to be examined, to falsify the evidence of the said witness, but that not one of them was called or examined, by reason that it was basely, shamefully, and clandestinely agreed on, to the great injury of the character and hurt of mind of the wife, and expressly contrary to the assurances of the party, between husband and defendant, through the means of the agents, solicitors, friends, or advisers, that if the said defendant would not call those witnesses, but would suffer the plaintiff to take a verdict, he should risque nothing by the event of the suit, as the husband would undertake for the payment of the costs and damages, or would not receive them of him, or would repay them, if received, which offer was accepted by the defendant, or by some one on his behalf: that the husband, having collusively obtained a verdict, the costs and damages have not been received from him, or, if received, they have been repaid or remitted back."]

The admission of this allegation was opposed; it was however admitted by the Court, observing—"That the object of it was to take off the effect of the verdict, as pleaded in this cause, by shewing that it had been obtained by collusive means. A verdict is admitted to be pleaded in the proceedings of the Ecclesiastical Court;—it has been allowed for a considerable time, though I never distinctly understood on what legal principle it was originally introduced. It is often said, that it is no direct proof, but merely a circumstance; yet that is surely somewhat inaccurate; if introduced as a circumstance, it can only be on the footing of a circumstance that makes proof, though of a low kind, below what the law calls a *semi-probatio*; yet still of the nature of evidence or proof; but how can that be evidence against the party, which has passed in a suit to which she was not privy. It is said that it is introduced for the purpose of showing that there has been no collusion:—Collusion, or no collusion, with the alleged adulterer, is a fact which cannot, either way, legally affect the wife, who is neither party nor privy, in the remotest degree, to that litigation: nor do I understand in what view such an action, against another party, can, in any degree, instruct the conscience of the Court upon that issue between husband and wife. Taking, however, the verdict as stated, that it is introduced to show there was no collusion, *that* alone is a sufficient reason why the party should be permitted to show that the other suit was not carried on *bona fide*;—that it was a mere fiction in the other Court. It is clear, as laid down in the *Dutchess of Kingston's* case, A. D. 1776, State Trials, vol. 20. p. 355, that all sentences, obtained by collusion, are mere nullities; and all Courts may examine into facts under which a

will not be founded on that verdict, it is of little importance how it was obtained; but the suggestion that it was obtained in the manner alleged, seems to me again to be totally unsupported. That no witnesses were examined on the part of the defence, may be, under any circumstances, a slight presumption, perfectly to be explained by different solutions, which have been afforded to my satisfaction. With respect to the damages not being paid at the time when the Solicitor was examined, that is accounted for in a manner which takes off what little suspicion it might create. What the witness says is, "that the other Solicitor applied to him for payment of these damages, and an inconsiderable sum was postponed for the present." That I am to infer that these damages have not been subsequently paid, would be giving an effect to the testimony of this witness much beyond what his intentions or his expressions justify, and I have likewise the evidence of the solicitors in the cause, persons perfectly acquainted with the whole course of the proceedings, who swear, that they are strangers to every thing of collusion, and that they have every reason to believe that the action was carried on *bona fide*, with the utmost sincerity, on the part of every person who was interested in the determination.

Another defence has been resorted to by counsel, that there has been a condonation: a defence, not set up by the party herself, and which, upon the face of it, is utterly inconsistent with the statement of her plea,—that there was a conspiracy productive of a false and malignant accusation against this lady—that this conspiracy has been systematically pursued—that agents have been employed—that witnesses have been bribed, and that the cause has been matured to its present form by these practices. The condonation supposes, that after this machine had been completely put in motion, and the whole business arrived at its ultimate maturity, and was prepared for explosion, and after the party was almost in possession of the fruits of his wicked industry, he did at this moment abandon the whole, and, by a remission or condonation to his wife, defeat the effect of all this activity, which had been employed for months before at the expense of guilt and anxiety. Now that defence appears to be so perfectly incompatible with every thing which the party herself has resorted to, that no very serious consideration is due to it.

It has been said, that not having been propounded by the party, it is excluded from the notice of the Court—undoubtedly, in fairness, it ought to have been stated, because, being a plea in bar, it is a plea which the plaintiff ought to have had an opportunity of contradicting; at the same time the Court is not precluded from noticing it, at least to this

sentence has been obtained by fraud. In *Lloyd v. Maddox*, Moore's Rep. p. 917, a prohibition, prayed on that ground, was refused. It is therefore established, that a party may show another Court to be imposed on by covin of parties colluding together, and that he is at liberty to show such collusion; but he cannot go further—to allege the verdict to be erroneous, or that evidence was improperly given. It is pleaded here, that the verdict was obtained on the oath of one single witness, who did not even swear to an act of adultery. This seems to imply that the jury formed a wrong conclusion. It pleads also, that the servant still continues in the service of the party: that also may seem to insinuate that the jury did not take all circumstances properly into consideration. These facts are, I think, clearly not admissible. The rest, which pleads that evidence was suppressed, and that there was an agreement not to receive the damages, and that the cause was so managed as not to bring out the merits of the case, may be admitted."—Admitted as reformed.

effect, that if the fact appeared clearly and distinctly, upon the face of the depositions, that there had been cohabitation, subsequent to the knowledge and detection of the guilt of the wife, it might, *ex officio*, call upon the husband to disprove it. But upon what proof does it rest in the case? Why, that, upon the night of the last fact of criminality, Mr. Elwes is proved to have been in town at his house in a considerable state of indisposition—and I am to infer that, on that very day, the witness informed the agent of what he had seen, and that the agent informed Mr. Elwes, on the same day, of the communication which had been made to him, and that Mr. Elwes did cohabit with his wife notwithstanding that information. This, besides its improbability, stands so destitute of proof, that it does not require minute discussion.

4389.
H. 49. Mr. Elwes had employed persons to watch the conduct of his wife, and it is probable that the result was not communicated to him until the case was completed—a circumstance which occurs in all cases, where the discovery is not made at once. A husband has suspicions—he has some intimations—he has enough to convince his own mind, but not to instruct a legal case. In that distressing interval his conduct is nice, and it is difficult to refrain from cohabitation, as the means of discovery would be frustrated; and if he continues cohabitation, it then becomes liable to that species of imputation, which has passed to the disadvantage of this gentleman.

45 Taking the whole of this case into consideration, I am firmly of opinion that the facts of adultery are proved; that, for a considerable space of time, and at different intervals, this lady shared her husband's bed with these two persons;—and I am satisfied of this, upon evidence which I deem to be credible, and which appears to me to be sufficiently concentrated, and in no degree invalidated by any adverse testimony: I am of opinion that the imputation of connivance is totally unfounded, and that the charge of subornation is likewise unfounded; and that the party is entitled to the sentence of separation which he has prayed.

Affirmed on appeal. Arches, 2d May 1797. Deleg. 26th June 1798.

367.
2 E. 2. 8. 2. 57/19. SINCLAIR v. SINCLAIR.—p. 294.

Protest, Proceedings in a Court of Brussels, pleaded in bar to a suit *here* for a divorce by reason of adultery, not sustained.

THIS was a suit of divorce, brought by the wife against the husband, by reason of cruelty and adultery; in which Mr. Sinclair appeared under *protest*, *alleging*, in bar of the proceedings, that such suit could not be entertained by the Court; for that the marriage had been celebrated at Paris, and had been since dissolved by a sentence of the Court at Brussels, on proceedings, instituted by him, for nullity and divorce by reason of the adultery of the wife.

In reply, it was alleged, on the part of Mrs. Sinclair, that there had been a marriage also solemnized in England in 1792, and that the pretended divorce was not for adultery, but a sentence of nullity of marriage; the fact of the aforesaid English marriage being entirely suppressed.—To which it was further answered on the part of the husband,

that, although the sentence of the Court at Brussels purported to have passed in form only, as a sentence of nullity of marriage, it was really upon a proceeding for *divorce by reason of nullity and adultery*; and on consideration that the adultery had been fully proved, the husband had acceded to the prayer of the wife, that it might be described in the sentence as a sentence of nullity only, in order to avoid the public exposure that attended such sentences at Brussels, and that the ground of adultery was omitted in the sentence at the instance of the wife, and to save her reputation.

On this statement, which was set forth in act of Court, Dr. Laurence argued in support of the protest, that as there had been a former suit in a competent Court in another country, where the parties had resided, it was entitled to be considered universally as conclusive, on the point adjudged, in all countries, and that there would be no marriage subsisting on which these proceedings could be had. That from the nature of that suit, it appeared also that the wife had been convicted of adultery, and that she could not therefore institute proceedings against her husband to pray restitution; although it had been said by some ancient authorities that the Court might take on itself to enjoin a reconciliation between them. That, with respect to the proof required of the real nature of the suit at Brussels, the Court would make allowance for the destruction of all records, which had been occasioned by the revolution there, and permit parol evidence of the nature of those proceedings, or allow further time to supply more authentic documents on that point.

On the other side, Dr. *Arnold* contended, that there was no sufficient foundation for any discussion of general principles; as the marriage, pleaded by the husband, was described to have been solemnized by a Swedish clergyman at Paris, and the divorce at Brussels had passed on that marriage, whereas the wife pleaded a marriage at London in 1792. That the description attempted to be given of the nature of the divorce did not agree with the tenor of the instrument exhibited, and the Court would not permit a different character to be fixed upon it by parol evidence. That the Court at Brussels was described as a Court of competent jurisdiction for strangers; but there was no proof that Mr. Sinclair was entitled to be considered as a stranger, since he describes his own residence to have been generally on the continent, but principally at Brussels. That on these grounds the protest was untenable, and it was prayed that the Court would overrule it.

JUDGMENT.

SIR WILLIAM SCOTT.

This is a suit originally brought by Lucy Ann Sinclair against John Gordon Sinclair, for separation, by reason of cruelty and adultery, to which he has appeared under protest; and I am to inquire whether this protest states any thing that should prevent the Court from investigating the facts of the complaint. Mr. Sinclair describes himself to be a native of Scotland. That circumstance will not affect the jurisdiction of this Court. He states, also, that the marriage was had at Paris:—That, likewise, is no objection; since, wherever the marriage was celebrated, this Court may inquire into its validity, looking, as it would, to the laws of the country, and would enforce the matrimonial duties on all persons within its jurisdiction. It does not appear, even, that the affidavits support the act in the description which they give of his residence, since they do not represent him to have been a domiciled and in-

corporated inhabitant of Brussels, but to have been in the English army in Flanders, and, on that account only, subject to the laws of Brabant, in matters arising out of his conduct in that country.

He describes his suit against his wife to have been for divorce, by reason of adultery, acknowledging, by that very charge of adultery, the marriage *de facto*, which is, nevertheless, now to be impeached by these proceedings as null and void.

E.L.E.
2579. "Something has been said on the doctrine of law, regarding the respect due to foreign judgments; and undoubtedly a sentence of separation, in a proper Court, for adultery, would be entitled to credit and attention in this Court; but I think the conclusion is carried too far, when it is said, that a sentence of nullity of marriage is necessarily and universally binding on other countries. Adultery and its proofs are nearly the same in all countries." "The validity of marriage, however, must depend, in a great degree, on the local regulations of the country where it is celebrated. A sentence of nullity of marriage, therefore, in the country where it was solemnized, would carry with it great authority in this country; but I am not prepared to say, that a judgment of a third country, on the validity of a marriage, not within its territories, nor had between subjects of that country, would be universally binding." For instance, the marriage, alleged by the husband, is a French marriage; a French judgment on that marriage would have been of considerable weight; but it does not follow that the judgment of a Court at Brussels, on a marriage in France, would have the same authority, much less on a marriage celebrated here in England. Had there been a sentence against the wife for adultery in Brabant, it might have prevented her from proceeding with any effect against her husband here; but no such sentence any where appears.

The only instrument, which is produced as a sentence, does not contain a word respecting adultery: it speaks singly of nullity: and parol evidence cannot be admitted to explain and give a totally different effect to the instrument from what it purports itself to bear. The instrument directly rebels against the allegation of the protest. That there was any proceeding for adultery is contradicted by the plain language of the authenticated instruments. It is a confusion of terms, as has been observed, and what is not often seen in a matrimonial court, to begin first with disputing the validity of the marriage, and then to go on to prove, as against an established marriage, the offence of adultery. What a strange proceeding it is, as well on the part of the Court, as on that of the parties! That the cause should have gone on to sentence on proofs of adultery, and that a Court of Justice could accede to the prayer of a party, and change entirely the form and substance of the sentence by pronouncing for a divorce on the ground of nullity only. It is difficult to believe that such could have been the conduct of any Court whatever: And if it has been so, it is quite sufficient to dispose of its authority.

The paper, which has been exhibited to prove the examination of witnesses, *de bene esse*, on adultery, is nothing but a licence to examine on that charge; but there is no mention of any actual proceeding, or any sentence on that charge. How is it possible then to say, there has been any sentence in a Foreign Court for adultery, which should stop this Court from giving to the wife the benefit of the laws of this country? I must therefore declare the protest insufficient, and direct Mr. Sinclair to appear absolutely, and answer the general charges of his wife's suit.

WILLIAMS v. WILLIAMS.—p. 299.

Divorce, by reason of adultery of the wife, not decreed.—Circumstances, how far sufficient.—*Identity* not proved.

THIS was a case of divorce by reason of the adultery of the wife, in which the identity of the wife was not established.

JUDGMENT.

SIR WILLIAM SCOTT.

This is a proceeding, instituted by Mr. Williams, to obtain a divorce on a charge of adultery; and, if he has laid before the Court sufficient proofs, he will, no doubt, be entitled to it: but if he has not established the necessary facts, either from disability or accident, or from the less laudable motive of trying the experiment of how little proof will be accepted as sufficient, or from whatever circumstance, he must fail notwithstanding any private opinion, which the Court may entertain, on the real merits of the case. There are some circumstances in this case which alarm the jealousy of the Court, as appearing a little suspicious: there is no plea on the part of the wife, nor any interrogatories administered. The verdict, which has been pleaded, was obtained nearly on default, and without any defence. This proves a great facility at least, and will make the Court more vigilant to see that the two main points of such cases are sufficiently proved, viz. the criminal act, and that the person, against whom the proof of that act is established, was the wife.

It is undoubtedly true, that direct evidence of the fact is not required, as it would render the relief of the husband almost impracticable; but I take the rule to be that there must be such proximate circumstances proved, as by former decisions, or on their own nature and tendency, satisfy the legal conviction of the Court, that the criminal act has been committed. The Court will look with great satisfaction to the authority of established precedents; but where these fail, it must find its way, as well as it can, by its own reasoning on the particular circumstances of the case.

The libel pleads the marriage, which is not denied, and is sufficiently proved, in 1789. The parties cohabited several years, till September 1797. But it is pleaded, that in 1794, a particular intimacy was contracted with a Mr. Thomas, who frequently visited at the house; but no notice is taken of a circumstance, which appears in evidence, that he actually lodged and boarded in the house three months during the year 1796: the greatest intimacy therefore subsisted between both the parties and Mr. Thomas; and I am to presume that no improper familiarity had been observed till this time, or Mr. Williams could not have permitted him to lodge in his house: and to suppose otherwise, would be to suggest that, which would surely excite the legal suspicion of the Court. I will take it however more naturally and justly, as if there was nothing improper known to Mr. Williams in 1796; but it is not explained why Mr. Thomas went away, since there was no quarrel, as he continued to visit.

I must observe, that there is very little of the history of the case brought before the Court. It is alleged on the fourth article, that he came clandestinely in the absence of the husband, and took indecent

liberties: there is however no witness examined on this article, but the maid servant, who says, "that after he ceased to live there, he called often about two o'clock, when the husband was usually not at home." She mentions nothing of improper liberties, and there is nothing to convince me that he did not, at that time, continue the friend of the husband, as well as of the wife. It is next pleaded, that the husband began to entertain suspicions, and remonstrated with his wife; but there is no evidence of this in the depositions. It is said, that this would be a secret transaction; but it would be probable that the husband would mention it to some one of his own family, or the friends of his wife; and, unless it appears in some way as a fact in the case, the Court can take no notice of it. Particular visits are likewise pleaded; and it is alleged that, on one occasion, happening on the 10th of May, the husband surprised them together, and that there was great confusion and agitation betrayed by them, and that Mr. Williams forbade Mr. Thomas to come any more to the house. This would be a fact that would make a strong impression on the mind of the Court, if it was proved; but all the effect of the evidence is,—that Mr. Williams came and found this person with his wife, and further the witness cannot depose: there is no proof of the agitation of the parties, nor that the door was obstructed, nor of any disapprobation expressed by the husband; and the Court cannot make inferences without actual proofs to support them.

The next act pleaded is that Mr. Thomas took lodgings in Staples Inn for the purpose of carrying on the adulterous intercourse; and that the wife visited him there, and stayed a considerable time, and that they passed for husband and wife.

On this part of the allegation, Mary Johnson says, "that in March 1797, Thomas hired the lodging, consisting of a dining-room, a bedroom, and closet, saying, that he lived in the country, and wanted a place in which he might write and transact business; that he should bring his wife to drink tea; and that he afterwards brought a lady, whom he called Mrs. Thomas, who stayed two or three hours, two or three times a week, and that he was not visited by any other person." This is the whole of her deposition. There are two other persons, who were employed by Williams to dodge his wife, who prove "that they often saw Mrs. Williams go to this house, and stay there, and that Thomas afterwards came out with her."

3d 306. It is said this is complete proof of adultery; and a case is alluded to of *Eliot v. Eliot*, Consist. 20th Feb. 1775, *Arches*, 23d Feb. 1776, in which the Court decided,—that a woman, going to a brothel with a man, furnished conclusive proof of adultery. And it is asked, what is the difference between that case and the present? since it cannot be presumed that Mrs. Williams went for innocent purposes to a house occupied in this manner. This, however, assumes many facts: first, that it was not his ordinary lodging, and that she knew it. It is not proved, as assumed, that she took the name of Mrs. Thomas; he called her so, and said that she was his wife; but it is not proved that she called him her husband, or that she knew that he called her his wife: he might speak of her in that name, but that will not show her knowledge of the fact. The only circumstance of clandestinity which is proved, is, that Thomas attended her almost to her own house, and then left her; but that the Court should infer that this happened from a clandestine inten-

tion, or that it might not be by accident, is, I think, not warranted by any rules of evidence on which this Court can safely proceed.

The question then comes to this,—does the visit of a married woman to a single man's lodging or house, in itself, prove the act of adultery? There is no authority mentioned for such an inference, but the case of *Eliot v. Eliot*, which is open to the distinction, arising from the character of the house in that case, which is too obvious to be overlooked. It would be almost impossible that a woman could go to such a place, but for a criminal purpose; but in the case of a private house, I am yet to learn that the law has affixed the same imputation on such a fact. In a late case of *Ricketts v. Taylor*,^(a) in the King's Bench, the visit of the wife to a single man's house, combined with other circumstances, was held sufficient. In that case, the windows were shut, and there were letters which could not be otherwise explained. That case, therefore, is no authority in this inquiry, and though the Court might be induced to think that such visits were highly improper, it must recollect that more is necessary, and that the Court must be convinced, in its legal judgment, that the woman has transgressed not only the bounds of delicacy, but also of duty. There is nothing stated of any improper conduct in the observations that were made upon the conduct or behaviour of the parties at this lodging,—no description of the bed-room, or any such circumstance; and, if there had been such appearances, it is scarcely possible that they should have been forgotten; but none are brought forward that can induce a presumption of any conjugal act.

The whole amount of the evidence on this article is, that she visited at these lodgings, not calling herself Mrs. Thomas, and not knowing that they were not his ordinary lodgings,—without any other proof of clandestinity than that, on two or three occasions, he did not accompany her quite to the house of her husband. In a following article it is pleaded, “that Mr. Williams, being convinced of her criminal intercourse, on the 9th of September separated himself from her bed, and on the next day he charged her with it, and she eloped.” The libel does not here go on, in the usual form, to say, that, when he charged her with this accusation, she did not deny the same; and there is no proof as to the manner in which the charge was received: she retired,—but to what place does not appear. Four days afterwards her sister received a letter from her, which the Court is required to consider as supplying that proof which might without it be incomplete. It is called a confession.

The Court, however, must remember, that confession is a species of evidence which, though not inadmissible, is to be regarded with great distrust: There is a canon particularly pointed against it, which says, “*nec partium confessioni fides habeatur*,” Canon, 105: and though it is evidence which is not absolutely excluded, but is received in conjunction with other circumstances, yet it is, on all occasions, to be most accurately weighed. The expressions are, “I am very unhappy—for God's sake hide my faults—those who know not what I suffered, will blame my conduct very much.”

Am I then placed in such a situation, by this evidence, as to say that it must necessarily refer to adultery? She had been detected in impru-

(a) *Consist. Ricketts v. The Right Honourable Lady Elizabeth Ricketts*.—A sentence of divorce was pronounced in this case on the 20th Feb. 1799.

dent visits—it might allude to them. Can the Court infer the admission of adultery from these expressions, where nothing is proved but visits? The husband may presume more; but the Court, considering the weight of circumstances, accurately and judicially, does not feel itself warranted to say that they amount to a confession of adultery, or that such is the necessary interpretation of them. The mention of Thom in that letter is also interpreted to mean Mr. Thomas; and though the witness says, she believed it meant Mr. Thomas, it is not a natural appellation, and does not carry that part of the case further. Where she passes that interval of her elopement is not shown. She might be living with her family, but all that is left in blank.

The next fact is, what passed at Gravesend, where the officer of the Court went, by the direction of the Proctor, and served the citation upon her. That there were two persons in the house at Gravesend at that time—one passing by the name of Thomas, and a woman with him, who slept and cohabited together, is proved beyond all doubt. And the Court has only to consider in this part of the case, whether the identity of the party is sufficiently proved. The rule, which has been laid down on this point, is solid, and very necessary to be carefully observed—that the identity is to be proved, not merely by acknowledgment to the officer, and by the appearance of the party in the cause, but by extrinsic evidence. The belief of the officer is necessarily founded on various incidents in the cause, before and after the citation, and is not alone sufficient. The waiter and chambermaids at the Inn, speak nothing to the identity, as they had no previous knowledge of the party; and can form their opinion only from this inquiry.

Then how stands the evidence on this point? It is said, that she had before assumed the name—but that is not shown—only that Thomas called her so. Is the Court then, on the mere answer to the libel, to presume identity? It is said, that she is gone abroad, and that it is not in the power of the husband now to identify her more particularly. The Court, however, wishes to know what prevented him from sending down some person, who had known her previously, together with the officer of the Court? It was known that the officer of the Court was not acquainted with her, nor the witnesses at Gravesend; and also that Mr. Thomas was on his way to the Cape of Good Hope. The Court is not to be left to conjecture on a point so material, and where precise and satisfactory evidence might easily have been obtained. (a)

On the verdict I need not observe that it is no evidence against the woman: it is only introduced into these proceedings to satisfy the Court, that the husband has honestly endeavoured to obtain all the redress that the law will afford. In this case, it appears to have passed by default. Under all these circumstances, whatever may be the private opinion impressed on my mind by some parts of the evidence, I do not feel myself to be judicially warranted to pronounce, that the proof of the necessary facts, which the law requires, has been established, and therefore I must dismiss the party from this suit. The case will probably be

(a) The Court, about this time, had occasion to make similar observations, on the defect of proof of identity, in other cases in which the proceedings failed on that ground.

submitted to a more experienced tribunal;(a) and from which I shall be glad to receive any information, for my future guidance, that may be given. But, on my own judgment, I cannot pass this divorce.

(a) This cause was appealed to the Court of Arches, where an additional allegation was given in, pleading the identity in a fuller manner, and on which no doubt remained in the case.—The Divorce was accordingly decreed.

HUBBARD v. BECKFORD.—p. 307.

Dilapidation.—Demand against a sequestrator. Objection thereto, "that he was not liable for more than the surplus, on rendering his account,"—not sustained.

In this case a decree, to answer to a demand of dilapidations, had been taken out, on the part of the Rector of Shepperton, against Beckford, the person who had been receiving the profits of the living of Shepperton, under a sequestration, obtained against the late incumbent by virtue of the King's writ to the Bishop of the diocese.

An allegation(a) was offered on the part of the sequestrator, to which Dr. *Nicholl* and Dr. *Laurence* objected—That, by the admission of the libel without opposition, the principle had been allowed, that the sequestrator was liable to dilapidations: That it was a charge from which the incumbent could not exonerate himself; and any other person, standing in his interests, was equally liable to it: That repairs were mentioned in instruments of sequestration, as an incidental expense attending the sequestration: That the third article of the allegation, in substance, admitted such previous demands, by claiming an allowance for some repairs, and for the service of the Church: That the same principle was to be acted on throughout. The claim, in this case, was only £507., and the balance in the estimates was not more than £2007., 50s. being allowed for old materials: That it had been expected that this demand would have been amicably settled; but the expenses of defending this suit and another, which ought not to have been resisted, had been now pleaded in diminution of the effects; and it was hoped that the Court, seeing that this allegation could have no legal effect, would reject it, and thereby prevent further expense.

In reply, Dr. *Arnold* and Dr. *Swabey* denied that the principle of this demand was admitted, and contended, that the sequestrator was only liable to pay over the surplus, after his own demand had been satisfied, as offered by him in his allegation. The objection, therefore, was to be considered on general principles, as stated to that article of the allegation; but it could not be sustained. It is not true, that dilapidations are

(a) The allegation pleaded the facts on which this sequestration had been obtained; that there had been other sequestrations issued, on which he, Beckford, prior to the death of the Rector, had been called upon, by citations, as receiver of the profits of the rectory of Shepperton, to render a true account of what he had received, and that he exhibited an account accordingly;—that out of the tithes he had collected, he had expended considerable sums of money on the reparation of the rectory house, barn, stable, &c. and likewise for the use and service of the Church, and various other perquisites, charges, &c.;—that Mr. Beckford is ready and willing to exhibit his vouchers in support of this account, if required; and that he now is, and always hath declared himself willing to pay the balance, if any, in whatever manner the Court shall direct, on being legally indemnified.

to be claimed of the sequestrator, in preference to his own demand. The *writ* to the Bishop is mandatory and imperative, and contains no qualification, that will authorize the Bishop to retain any portion of the receipts for dilapidations; nor can the Bishop himself engraft any such limitation upon it. If he could, the effect of the instrument might be entirely defeated: The sequestrator is not bound to do more than account faithfully for the surplus, after his debt is satisfied.

There is no priority, in this case, in favour of dilapidations: the benefice might have been sequestered for causes growing out of the authority of the Court *alone*, and, in such cases, the Court might have authorized previous deductions for repairs of dilapidations. But here the dilapidations constitute only a simple debt, and there are these conflicting claims of a superior class, as on judgment debts; and the Court cannot support the former to the prejudice of the judgment creditor. It was submitted, therefore, that the sequestrator is entitled to pay himself, and to reimburse himself for all costs incurred in defending suits brought against him, as they are expenses falling on the living, and incurred only in defending the possession, which the law has given to him.

JUDGMENT.

Sir WILLIAM SCOTT.

This is an allegation offered on the part of a sequestrator, who has been appointed the receiver of the profits of the living of Shepperton, under the King's writ, directed to the Bishop, on which this sequestration has issued. It pleads—that the sequestrator has incurred sundry charges, which he desires to be permitted to stand in his account, and to be dismissed upon paying over the surplus, after the discharge of his own debt. The objection taken is not so much to the particular items of the account, as to the general principle. Some part of the allegation is merely introductory. With respect to what has actually been done under this sequestration, it is highly necessary that the Court should have before it the account, which the sequestrator is bound to render to the ordinary, of what he has done, under the authority delegated to him. I shall therefore admit this allegation as to those parts, observing also that there ought to be stated the date of the first sequestration, an omission which must be supplied.

It may be proper, however, to say a word on the general question, and with respect to the points which have been the subject of discussion in the argument, and which may come before the Court again, at the final hearing of the cause. On the general principle, I am inclined to hold, that the sequestrator will be liable for dilapidations. The King's writ issues to the Bishop to levy a *sum* for the discharge of the debt.—This writ has been truly described as mandatory to the Bishop, who is, in a general sense, only ministerial. (a) The sequestrator is a kind of

(a) On the duty of the Court to carry such writ into immediate execution, the following case has occurred:—In *Campbell v. Whitehead*, Consist. 6th December 1820, an application was made to the Court, on the part of Sir Alexander Campbell, for a sequestration of the Vicarage of Little Clackton, Essex, on a writ of *levari facias* directed to the Bishop. It appeared that two writs had been lodged in the Registry of the Court, one, by Whitehead, in November, the other, granted to the plaintiff, at a later period. A *caveat* had been entered against the first, on the part of the plaintiff, and it was certified that the Court of Common Pleas had superseded that writ for irregularity on the 28th Nov. On the second writ a *caveat* had also been entered, and on its being warned,—Dr. Dodson now prayed, that sequestration might issue on the second writ, and contended, that the Court was bound to act immediately in carrying it into execution;

bailiff to the Bishop. There is no mention of any purpose, but the payment of the particular debt: it is, however, a thing incident to, and inseparable from, the subject matter itself, that there are certain duties and expenses for which the sequestrator is bound to provide.

The instrument issued under the authority of the Bishop, and contains a clause of allowance for all necessary charges; and I do not know on what principle it can be maintained, that the repairs of the Chancel, and of the parsonage, are not necessary charges. The Clergyman is, by law, equally required to provide such repairs, as well as the performance of Divine Service, and he cannot exonerate himself from one of those duties, more than from the other. The creditor is the person to whom the sequestration is usually granted; but that is only for the convenience of the proceeding under it, and by the authority of the Bishop. The sequestration might have been granted to the Churchwardens, or to others; and the creditor is to act, as any other person would be bound to act in that character,—he is not to give to himself that preference, which a third person could not be compellable to allow.

I throw out this observation, as the substance of my opinion, on the general question, when it shall hereafter be brought fully before the Court; and I am inclined to hold that the sequestrator will be liable for charges of this nature, as inseparable from the benefice—and that they could not be disjoined from the duties of the sequestration, even by the authority of the Bishop, as observed in argument, even if he could be supposed to have sanctioned any such pretension.

On a subsequent day, a further allegation was given in, pleading, in substance, that since Mr. Beckford had exhibited, on oath, the account of the tithes, profits and emoluments of the Rectory of Shepperton as by

that it was in the nature of a *feri facias*, or *levari facias* to the sheriff, who had no discretionary power, but was bound to execute the first writ when presented to him, as has been held strongly in cases of divers writs, and even when there had been a seizure on the second writ, 5 Mod. 376. 1 Salk. 320. 1 T. R. 729; that, in this case, the Court of Common Pleas had rescinded the first writ, and the second was therefore entitled to priority, being, in fact, the only one in force; that the Bishop is to be considered as an ecclesiastical sheriff, and his office was merely ministerial; that no danger however could accrue to the Bishop, as bond had been given to him; that if there had been any error in rescinding the first writ, the Bishop should be indemnified.

On the part of Mr. Whitehead, Dr. Swabey resisted this prayer, upon the ground, that the first writ had been repealed in error by the Court of Common Pleas, and stated, that, on the first day of next term, that Court would be moved to rescind the order so made; and relied on the opinions of Mr. Serjeant Pell and Mr. Chitty, which had been given to this effect. He therefore prayed the Court to defer to make any order, on this application, till the next Court day: and submitted, that the Court must have such discretionary power, as otherwise the opposite party could not have been justified in stopping the progress of the first writ?

JUDGMENT.

Sir WILLIAM SCOTT.

It would have been my duty to have proceeded upon the first writ if granted and unrevoked; because I am of opinion that the Court is bound not to delay the immediate execution of a writ, but to give the party all the benefit of priority. It is however shown, by a notice which has been left in the Registry, that the first writ has been revoked as *irregular*, and *informal*, and that is not denied—though it is said to have been so superseded by error. There is nothing before the Court, which shows, that the first writ was revoked, in error, except the professional *opinions* of two gentlemen at the bar: but whatever respect I may pay to those individuals, I cannot put their opinions in opposition to the judicial decree of a court of justice. The Court is therefore bound to direct sequestration to proceed immediately to Sir Alexander Campbell.

him collected and received, he had expended the sum of 112*l.* upon the two barns, and their appurtenances, and had caused them to be effectually reinstated and repaired. To the admission of this additional plea, it was objected,—that it was no answer to the general demand;—that the sum, stated to be expended, was more than the estimate on that part of the premises, and had therefore been improvidently expended;—that, as it had been done since the commencement of these proceedings, it was an act of the sequestrator in his own wrong, and could not be set against the general demand which had been made upon him.

The Court said—If I understand the nature of this allegation, it means to plead, in answer to the libel, claiming 74*l.* for one part of the dilapidations,—that Mr. Beckford wishes to shew that he has expended 112*l.* It is quite impossible that I should permit such an averment, in opposition to the claim made upon him, for that part of the dilapidations: that, being charged with dilapidations, on one item, to a particular amount, he has laid out more than the sum required. It is an irregularity, perhaps, that he should have done any thing to the barns, since the time of giving in the libel in these proceedings. From that time, the matter was under the protection of the Court; and perhaps the Court would not exceed its legal power, if it was to refuse to take any notice of such an expenditure. Equity may suggest, however, that he should be entitled to some allowance, but only to the amount of the sum claimed in the libel.

The Court will therefore give him the opportunity of pleading simply—that he has repaired the barns; but it will not permit him to enter into a specification of the expenditure, beyond the estimate of it in the article of the libel.—I must here observe also, that suits for dilapidations are necessarily attended with great expense; and they ought not therefore to be instituted *here*, except upon *great* occasions. I strongly recommend to the parties to come to some accommodation. If however they go on, and it may be necessary to act on my directions on the matter now pleaded, I admit the article, subject to the alteration, which has been before sufficiently explained.

WALTER v. GUNNER and DRURY.—p. 314.

Right of Parishioner to a seat in the Parish Church.—Insufficiency of the return of Churchwardens, to an application for that purpose: Rule of construction as to Custom and the extent of a Faculty.

55) GOLDSMID, by her Guardian, v. BROMER.—p. 324.

Jewish marriage invalid under that law, by reason of the incompetency of witnesses, required as an essential part of the ceremony.

THIS was a suit of jactitation of marriage, instituted, on behalf of Miss Goldsmid against Bromer, both parties being of the Jewish religion, on suggestion that the asserted marriage was not valid, by reason of non-conformity of the ceremony to the Jewish law.

JUDGMENT.

Sir WILLIAM SCOTT.

This is a suit brought by Maria Goldsmid by her guardian, for jacti-

tation of marriage against David Bromer, who confesses the jactitation, and justifies, by pleading a marriage to have been celebrated, and the same to be valid, according to the law of the Jews. The parties are both Jews, and both appeal to the Jewish law, by which this question must be decided, for on the mere fact there is no question. The Jews, though British subjects, have the enjoyment of their own laws in religious ceremonies; and the marriage act acknowledges this privilege, by excepting them out of its provisions: To deny them the benefit of their own law, upon such subjects, would be to deny to a distinct body of people, the full benefit of the toleration, to which they have long been held to be entitled.

This being a question of Jewish law then, the Court must be content to learn that law, as well as it can, from the professors of it. It is not denied that some ceremony has been performed, but it is alleged, "*that the celebration was not conformable to the law of the Jews.*" It is not alleged that the ceremony was defective in any other particulars, except "that it is essentially necessary that it should be performed in the presence of two witnesses, competent and credible, and subject to no disqualification imposed by the Jewish laws; which disqualifications may proceed from certain degrees of consanguinity to either of the parties who marry, or from non-conformity to the ceremonies of the Jewish religion;" and it is alleged "that the ceremony in this case was not attested by competent witnesses according to these rules."

The allegation of Mr. Bromer refers to the present general law of the Jews; it is therefore now too late to refer the Court back to the law of Moses alone, as it existed in the earliest times of Judaism. He admits the objection of consanguinity, as affecting the competency of witnesses; but the distinction of which he avails himself is,—that it must be relation *ex parte paterna*, whereas the witnesses objected to were related *ex parte materna* only; and that fact is not denied. He admits also the necessity of conformity; but with four limitations. First, that any irregularity or breach of the Jewish laws, or ordinances, as pleaded, must be deliberate and designed, and not the mere effect of human infirmity, or negligence, or mistake.—Secondly, that it must be *unrepented of*: as otherwise it might have been absolved and done away by due penitence. Thirdly, that it must be proved by witnesses, who are themselves unimpeachable. Fourthly, that it must be a disqualification arising before the ceremony, and not subsequent to it. He does not, however, allege expressly that the non-conformity, imputed to the witnesses in this instance, is within the exceptions which he has laid down, but takes the chance of what may arise on that point upon the interrogatories. It is to be observed also that the third limitation, which has been assigned, may be put out of consideration; for the only witness, who has been examined with regard to it, says, that it would not be necessary to ascertain the fact, by positive testimony, in favour of credit, for the law would presume, that the attesting witnesses were good and sufficient, if nothing was shown to the contrary. To the fourth ground of objection, the different answers in the interrogatories allow the utmost latitude of advantage, if the state of fact is in any degree dubious; but, if no such doubt exists, the objection is peremptory; the imputed criminal act must not be an act resolvable into mere infirmity, negligence, or mistake. The *limitation*, which has been assigned on the alleged disabilities, must be proved by those who mean to rehabilitate; because, if

a person does a criminal act, it must be presumed to be with a criminal intention, and that presumption will remain till the contrary is shown. This will be more necessary, if it appears that the acts were accompanied with circumstances which show no repentance, but a fixed and continued purpose of evil. There is also this further observation to be made, which is supported by Mr. Ish Yemene, "that if one witness only is disqualified, it entirely invalidates the ceremony," because there is then only one competent witness; and in this construction all the witnesses agree.

It appears, then, that the fact of marriage must be attested according to the Jewish law, and that this attestation is a constituent part of the validity of the ceremony. It is deposed to be essentially necessary, that both the witnesses must be competent; and I understand that if there was the clearest proof of the actual ceremony, it would not be sufficient, unless it was performed in the presence of such two attesting witnesses, of perfect competency. All the witnesses agree in this representation; I have therefore only to apply the law so certified to the facts; and, in doing this, I shall dismiss from my consideration much irrelevant matter, which has been introduced, particularly with respect to the conduct of the parties; because, if I understand the Rabbies correctly, if Miss Goldmid was claiming the benefit of marriage, and the attesting witnesses were not competent at the time, the ceremony would signify nothing. Something has been said also of the undue interference of Mr. Goldmid the father, for the purpose of setting aside this matrimonial union. But every parent is deeply interested in the welfare of his children, as affected by such connexions; and has a right to question a matrimonial contract entered into in the minority of his child; and I do not see that this right has been exercised, on this occasion, with any impropriety.

The young lady appears to have been of the tender age of sixteen, with all the inexperience, and susceptibility of hasty impressions, that are incident to that age; and it is the order of God, and the daily practice of society, that the experience of the father shall protect the inexperience of the child. It is said, that he is chargeable with inconsistency, in his manner of behaviour to this young man, as he had received Bromer into his family with great familiarity; but it never can be supposed that every man, who receives a person into his family, on a footing of civility, means that he should marry his daughter. It has been observed, also, that it would be to the disadvantage of the young lady, that the marriage should not be set aside; but the father has only to choose between calamities; he has a right to determine as he considers to be best for the interest and happiness of his family, and we must presume that he has so done. On the conduct of the young lady, I am unwilling to make any observation unfavourable to her, in consideration of her tender age. But as to Mr. Bromer, though much has been said of the honourable state of matrimony, it must not be forgotten, that it may be pursued on dishonourable motives; and though I do not say that it is so here, yet when a man, who is hospitably received into a family, avails himself of the opportunity of engaging, with clandestinity, the affections of a young lady, I do not think that he is a proper subject of lofty panegyric on that account.

I throw out of the case, also, all discussions of the reasonableness of the Jewish law, since I must take *that* as I find it. I must observe, however, that it does not seem to be without apology or reason, as I take the intention to be to render clandestine marriages almost impossi-

ble. Clandestine marriages are considered as *evils*, in all civilized societies. In England, they are discountenanced by the marriage act, and generally among Protestants. In many Catholic countries, also, the law interposes to prevent them. The law of the Jews, by its original incapacity of repeal, is out of the protection of the law of the countries in which they dwell, and it seems, therefore, to have done reasonably in providing, that if such contracts cannot be rendered null and void, by positive enactment, they shall be clogged with ceremonies, which render it almost impossible, that they should be effectually performed.

With these observations, I proceed to examine the facts of this case. On the 22d November 1795, it appears that the parties met by appointment, and Mr. Bromer took the lady in a coach to the Shakspeare Tavern, in Covent Garden, where two persons were stationed by him to be in readiness to be witnesses, though one appears also to have had other business there. In the presence of these persons he gave the ring, and pronounced the words in Hebrew which constitute the ceremony of *Kedushim*.

On this part of the case it has been contended, that the principal ceremony itself is not proved to have been rightly performed. But it is simple in its form, requiring only a few Hebrew words with the delivery of the ring; and it is to be presumed, that a person, intending to effect such a purpose, would take care to instruct himself, in what was necessary to be done; and it is not material that the words should be understood by either party. This part of the case, therefore, is sufficiently proved by the witnesses, by the certificates of the Jewish Tribunals, by the answers, and by the very form of pleading, which lays the invalidity, in the disqualification of the witnesses alone. There is also the conduct of the parties in cohabiting, which may be taken as strong proof that some such ceremony has passed, as would justify such cohabitation; if it had not been for the objections that are now alleged, to the competency of these *two* witnesses, whose attestation is an *essential* part of this ceremony. I say *two*, because if *one* is disqualified, there is an end of the business, as two are stated to be indispensably necessary.^(a) The question then is reduced to this: Is either of these persons, before whom the ceremony is stated to have been performed, shown to have been incompetent, not merely to attest, but to supply a constituent part of the ceremony? Mr. Hesse is accused of non-conformity. It is stated that he had profaned the Sabbath, by riding in coaches, and snuffing lighted candles, stirring the fire, and eating forbidden meats;—acts trifling to us, perhaps, who have no law applying to them, but not so according to the rites and ordinances of the Jewish religion. One witness, Levi, says, "that he had seen him repeatedly,

(a) In the treatise of *Maimonides, de conubiis Hebræorum*, c. 4. s. 6, it is laid down on the effect of witnesses, "Si quis sibi mulierem dicaverit, uno duntaxat adhibito teste, nihil nos ejus dicatio moveat, cum ambo rem profiteantur; multo etiam minus si quis dicaret, nullis adhibitis testibus. Si quis mulierem sibi dicarit, adhibitis ejusmodi testibus, quibus Lege non est testimonii dictio, dicatio nulla fuerit; sin eos adhibet, quibus sapientum autoritate non est testimonii dictio, aut quibus Lege sit testimonii dictio, necne, non liquet, is, si velit eam uxorem ducere, rursus coram idoneis testibus dicabit: Si nolit, repudii libellus ab eo mulieri opus est, vel propter incertam Legem, vel propter Sapientum certa vetita. Immo vero si dicationem mulier factam esse neget, aut arguat mendacii testes, nihilominus repudii libellum invita cogitur accipere. Atque eadem est omnium dicationum incertarum ratio. Si velit eam uxorem ducere, de integro firma dicatio fiet; si nolit, propter dubium mulieri ab eo repudii libellus opus est."

within these ten years, do these acts, and that he remonstrated with him on such occasions, but he replied, 'that he was no Jew, but considered himself as bound only to the exterior observances of the religion, in compliance with the wishes of his father.' "(b)

(b) In the responsive allegation, given in and admitted on the part of Maria Goldsmid, the 9th article pleaded "That, by the Jewish law, a person is incompetent and disqualified to give validity, as a witness, to any Kedushim or marriage contract between Jews, or persons professing the Jewish religion, by being related to either of the parties in the first and second degree of consanguinity, and that, according to the Jewish computation of the degrees of consanguinity, cousins german, or persons descended from the same grandfather or grandmother, are considered as related in the second degree of consanguinity, and that, in order to be a competent witness to the ceremony of Kedushim, the person *must not only be a Jew, but not be guilty of violating the religion and religious ceremonies of the Jews; and a Jew, who is a non-conformist to the duties and precepts of the Jewish religion, particularly in profaning the Sabbath-day, and so proved to be by two credible witnesses, is not a competent witness before whom Kedushim can be legally given.*"

10th. "That Michael Abraham Levy, one of the persons in whose presence the aforesaid pretended Kedushim is alleged and pleaded in the said allegation given in on the part and behalf of David Bromer, to have passed between him and the said Maria Goldsmid, is not, according to the laws and customs of the Jews, a competent witness to give validity to any such Kedushim or Jewish marriage contract between them the said David Bromer and Maria Goldsmid, but, on the contrary, is incompetent and disqualified by reason that he, the said Michael Abraham Levy, is first cousin to David Bromer, related to him in the second degree of consanguinity, the mother of David Bromer, and the mother of Michael Abraham Levy, being natural and lawful sisters."

11th. "That Emanuel Hesse, the other person in whose presence the pretended Kedushim is alleged to have passed, is not, according to the laws and customs of the Jews, a competent witness to give validity to any Kedushim or marriage contract, but, on the contrary, is incompetent and disqualified by reason that he the said Emanuel Hesse hath manifested himself to be a non-conformist to the duties and precepts of the Jewish religion, particularly in profaning the Sabbath-day in the presence of divers credible witnesses."

The nature of the evidence upon the 11th article of this allegation, may be collected from the depositions and answers of the following witnesses:—

Michael Abraham Levy, a witness examined on behalf of Mr. Bromer, to the 24th interrogatory, answers "that he hath a slight knowledge of his fellow witness Emanuel Hesse; that the said Emanuel Hesse is not a strict observer of his religion as a Jew; that he knows not, but hath heard, that the said Emanuel Hesse has in *divers instances and on several occasions* profaned the Sabbath-day, and eat forbidden food in contravention of the laws and precepts of the Jewish religion; that the respondent once saw him *eat meat and butter together*, which is in contravention of the laws and precepts of the Jewish religion."

David Joseph Wertheimer, to the 11th article of the said allegation, this deponent saith "that he hath known the articulate Emanuel Hesse, one of the persons in whose presence he hath understood and believes the Kedushim or marriage passed between the said David Bromer and Maria Goldsmid, parties in this cause, for eleven or twelve years last past; that about the time the deponent first knew the said Emanuel Hesse, he saw him eating *meat in a tavern at Frankfort, known by the sign of the Mulberry Tree*, which is a tavern where the *meat is not prepared according to the laws of the Jews*; that about two years ago the deponent saw the said Emanuel Hesse *eating meat among Christians in the Hercules Tavern* behind the Royal Exchange, London, which is also a tavern where *meat is not prepared according to the laws of the Jews*; that about a year and a half ago the deponent saw the said Emanuel Hesse *profane the Sabbath-day* at the house of Mr. De Fries, Basinghall Street, *by snuffing the lighted candles on the evening of the Sabbath*; that the foregoing actions are contrary to the laws of the Jews, and the said Emanuel Hesse hath thereby manifested himself a non-conformist to the duties and precepts of the Jewish religion, and a profaner of the Sabbath; that, by being guilty of such actions, he hath rendered himself, according to the laws and customs of the Jews, a witness incompetent and disqualified to give validity to any Kedushim or Jewish marriage contract."

To the 6th interrogatory, he says, "That committing murder, blasphemy, eating forbidden food, and profaning the Sabbath, by *kindling, extinguishing, or stirring a fire, or snuffing candles, or riding out on horseback, or in a carriage, on the Sabbath-day*, are the principal acts by which a person becomes disqualified according to the laws and

There cannot be a stronger instance of disclaimer of all observance of the regulations and ordinances of that religion, or, if I may so express it, of *an uncircumcised heart*. This then is sufficient, unless, as it has been contended by Dr. *Arnold*, a conviction is required to establish the incompetency. According to our own notions, founded on the principles of our law, an antecedent conviction might be necessary in the case of some criminal charges; but it is not alleged to be so in the Jewish law. So much for Mr. Hesse, whose disqualification is completely proved on the ground of non-conformity; and it disposes of the whole case, since, as before observed, *two* competent witnesses are required: it may be unnecessary therefore to inquire minutely into the ground of objection to the other witness,—his relation to either of the parties.

On that point, Mr. Ish Yemene is the only witness presented by Mr. Bromer, and he is complimented for his learning. I cannot presume to judge upon the justness of that eulogium; but I think I may venture to say, that a want of learning does not appear to be the principal defect imputable to him in this cause; since he appears to be a Doctor of *rather* a loose school. I think I perceive something of Sadducean laxity in his opinions, both in this and in the former cause; which detracts a little from the respect which might otherwise be given to his erudition; for I cannot forget that in the former case he had said, that Kedushim, without consummation, was perfect marriage—Now he says *otherwise*. The Talmud, according to Mr. Ish Yemene, is an overruling authority, to which the authority of Maimonides and other expositors must bend. In the ninth interrogatory, he is pressed by passages from the Talmud, which, he admits, go to disqualify the mother's relations,—the question

customs of the Jews to be a competent witness to give validity to any Kedushim or Jewish marriage contract."

To the 10th, "that he was subpoenaed, and did attend as a witness at the trial at Guildhall, in an action for Seduction, brought in the Court of Common Pleas, by Mr. Goldsmid against Mr. Bromer; that he stood at some distance, and there was so great a crowd, that he could not distinctly hear all that was said; that he recollects one ground of objection, but whether the only one or not he cannot say, there taken to the competency of Emanuel Hesse, was on account of his having, as well before as after his being a witness to the marriage in question, *eaten pork*."

Henry Leo says to the 11th article of the allegation, "that he well knew Emanuel Hesse about fifteen years ago at Frankfort, and that he, at that time, heard him publicly declare, *that he, Emanuel Hesse, did not consider himself as a Jew, and if it were not for his father, that he would renounce that religion; that for about these last ten years he hath been well acquainted with said Emanuel Hesse in London, and hath repeatedly seen him profane the Sabbath-day by riding in coaches on that day, and hath seen him repeatedly, on the Sabbath-day, at the Antigallican Coffee-house, stir the fire, and snuff the lighted candles; that, by such acts he hath manifested himself to be a non-conformist, &c.*"

To the 4th interrogatory this respondent answers, "that he hath, *times without number, remonstrated* with the said Emanuel Hesse when he saw him do any act which he considered inconsistent with the laws and customs of the Jewish religion; that he does not recollect in whose presence he so remonstrated with him; that the answer the said Emanuel Hesse returned usually to such remonstrances was, *that he did not profess himself to be a Jew; that he hath known him, after such remonstrance, repeat the wrongdoing.*"

Gabriel Cohen and Jacob Hart say to the 11th article of the allegation, "that, on the 9th day of December 1795, as he went into the Stock Exchange Coffee-house, near the Royal Exchange, which is a public coffee-house, and eating-house, where food is not prepared according to the laws and customs of the Jews, he saw the said Emanuel Hesse *eating part of a round of beef with sauce, appearing to be melted butter*, in the public coffee-room, in the presence of divers persons; that, by so doing, he, Emanuel Hesse, manifested himself a non-conformist to the duties and precepts of the Jewish religion, which forbids his eating in such manner."

is put, "whether relation *ex parte materna* is not as much a disqualification as *ex parte paterna*?" and I understand it to be a direct declaration of the Talmud, *that father's father* is to be applied, on this disqualification, in the corresponding style of *mother's mother*.

There is also an extract from Tur, a book of high authority, to the same effect, that sister's sons are under the same disqualification, as brother's sons. But Mr. Ish Yemene goes on to say, "that Maimonides has stated a different opinion." To this I must reply, what Mr. Ish Yemene said before, that where the Talmud is plain, the authority of Maimonides must yield to it. I must therefore remember that if Maimonides expresses a doubt, and the Talmud none; where the Talmud is on one side, and Maimonides on the other; although I will not say that so eminent a scholar as Maimonides was in error, I am bound to prefer the authority of the Talmud. On these grounds, therefore, I am of opinion that the other witness is incompetent, on account of his relations *ex parte materna*.

The case however does not rest here. I have also the judgment of the college of German Jews, to which community the party particularly belongs,—the sentence of the Bethdin, their chief tribunal,—and this judgment has been submitted also to the college of Portuguese Jews, who concur in it. Here then are Courts of great authority on this point, and on matter of Jewish law, entitled to the greatest respect, as they are Tribunals, whose certificate of the foreign law, must be received as most satisfactory, though perhaps their judgment is not equally satisfactory in matters of fact. Here is a question compounded of *law* and *fact*, and though the decision may not bind the Court, which has to try the fact for itself, it conveys the best information which it can obtain of the principles of law that are to be applied to it. They certify that they have found the marriage null, according to the law of Moses, without giving specific reasons for it. This defect however is, in some measure, made up, by the information which they have given in their examinations. I there find the grounds assigned, on which I form the same opinion.

This is the opinion that is to be collected on the legal merits of the case; and I see nothing in the moral estimate of the conduct of the parties, which inclines me to entertain a different sentiment. I therefore pronounce against the validity of the marriage, pleaded by Mr. Bromer; that he has failed in proof of the allegation in justification, and that Mary Goldsmid is not his wife,—but I give no costs.

The Counsel prayed the Court in addition to its sentence, to enforce perpetual silence, meaning to pray the same monition to the party as was prayed in the case of the Duchess of Kingston. (a) The Court said, it would decree it, if prayed.—Sentence accordingly.

Affirmed on appeal, Arches, 25th June 1799. Delegates, 19th November 1800.

(a) Consist. *Chudleigh v. Hervey*. 10th Feb. 1769.

HORNER v. LIDDIARD, otherwise **WHITELOCK**, falsely calling herself **HORNER**.—p. 337.

Consent of Parents, under 26 Geo. 2. c. 33. s. 11. not applicable to the marriage of illegitimate minors.

OLIVER v. OLIVER.—p. 361.

Restitution of conjugal rights. Counter-allegation,—of *cruelty in menacing and insulting treatment*, and prayer for divorce thereon, not sustained on the facts. Restitution decreed.

THIS was a suit brought for restitution of conjugal rights by the husband, in which a plea of cruelty set up on the part of the wife, and a prayer for separation, were not established.

JUDGMENT.

SIR WILLIAM SCOTT.

This is a suit brought by Thomas Oliver against Frances Oliver, his wife, for restitution of conjugal rights. The marriage is proved; the husband therefore is entitled to what he prays, unless some circumstance has deprived him of it. Mrs. Oliver has given in an allegation, in which she pleads that Mr. Oliver had been guilty of cruelty, and prays to be divorced from him. She has examined seventeen witnesses to that plea, and upon their evidence I am to determine the cause. If he has treated her in the manner pleaded, it will undoubtedly be a sufficient bar to the action, and she will be entitled to a sentence of separation; on the contrary, if there is not that sufficient proof which the law requires, it will be her duty to return to her husband, and endeavour to spend the remainder of her days in peace and mutual kindness.

The marriage took place in June 1798, when her former husband had been dead about a year. The *annus luctus* was passed; but during that interval, it appears she had entangled herself with some connection, tending to a matrimonial union with Mr. Bond: and it is stated in the evidence, that there had been an action brought by that gentleman, for a breach of promise of marriage, which failed. It appears, however, that she expressed great agitation of mind about it, during its dependance; it therefore may be presumed to have been an action instituted not without some foundation. It appears, by the evidence of Dr. Lake, that this lady is not always very well founded in her complaints, and that she is rather apt to view things in erroneous and unfavourable lights. Mr. Burchell says, "that an action was brought by a gentleman of the name of Bond against Mrs. Oliver for a breach of promise of marriage; that, though he has never heard Mrs. Oliver abuse or insult her husband, he has heard her charge him, with having involved her in that action," by his precipitating her into this marriage; adding at the same time, that if she had not been hurried into it, she should never have suffered what she did."

This really appears very like a habit of shifting off very much from herself the consequences of her own act, on a person who is not at all answerable for it. The lady was arrived at those years of discretion, when she must be supposed to have been capable of judging of her own conduct, and her own interests. I consider it only as her own act and deed, done with her eyes open, and with the perfect knowledge of all other engagements, which she might have entered into; I think therefore this was a complaint very improperly brought against her husband.

Dr. Lake says, "she was very apprehensive of the consequences of the trial, and spoke with considerable warmth and vehemence against Mr. Bond, and against Mr. Oliver, in general terms of reproach; and that she considered the object of each of them was to make a prey of

her, and to get what they could of her property." This sort of language strongly leads one to presume that the complaints, made by this lady, against other persons are not always founded in justice or truth. It appears that Mr. Oliver followed the business of a watchmaker, and likewise that of a dissenting preacher,—what his profits were, arising from these two occupations, I have no means of knowing; but it is reasonable to suppose they were of decent amount, such as two such employments might be expected to produce. Some imputations have been thrown out, that he was in a very inferior situation of life; it is clear, however, that he was not in circumstances of necessity, and that the union of two such persons, was not unsuited to produce mutual comfort, so far as property could secure it.

83/4. Upon the marriage, the lady, having very considerable property of her own, kept it in her own grasp, transferring to her husband only a very small proportion of it. Mr. Oliver, on becoming her husband, was at least her equal, if not her superior. It is the law of religion, and the law of this country, that the husband is entrusted with authority over his wife. He is to practise tenderness and affection, and obedience is her duty; and, in taking the character of wife, she is to take upon herself, at the same time, the duties attached to it.

It may, perhaps, be apprehended with some reason, that, where there is much disproportion of fortune, so placed originally, and so tenaciously retained, much harmony is not likely to be a lasting result. No situation is more calculated to produce the controversies that belong to Meum and Tuum. Arrangements may be made sufficiently consistent with mutual affection and convenience; but none such appear to have been resorted to in the present case. Here the husband was scarcely on a proper footing: The carriage was always considered by the servants, as exclusively belonging to their mistress; they looked up to her alone; and the husband is placed in a situation of degradation, which must give both considerable uneasiness,—on her part to maintain, and on his part to suffer it.

11. The charges, brought by the wife against the husband, consist partly of words of abuse and reproach, and partly of acts of a harsh and oppressive nature. Of words, it is sufficient to say, that, if they are words of mere present irritation, however reproachful, they will not enable this Court to pronounce a sentence of separation. She must try to disarm them by the weapons of civility and kindness; and if they fail (as unfortunately they often will), the law of this country requires, that she should submit to the misfortune, as one of the consequences of her own injudicious choice. Passionate words do not, according to the vulgar observation, break bones; and it is better that they should be borne with, than that domestic society should be broken up, and a husband and a wife thrown, in loose characters, upon the world. * Words of menace, importing the actual danger of bodily harm, will justify the interposition of the Court, as the law ought not to wait till the mischief is actually done. But the most innocent and deserving woman will sue, in vain, for its interference for words of mere insult, however galling; and still less will that interference be given, if the wife has taken upon herself to avenge her own wrongs of that kind, and to maintain a contest of retaliation. That the husband did, in various instances, insult his wife by words of abuse is, I think, sufficiently established in this case; and it will be his duty to reform such habits, if his wife should return

to his society. The words used by him are certainly sufficiently rude; but the feelings of disappointment and dissatisfaction, in the breasts of persons of coarse education, naturally enough find their way from their mouths, in no very refined language, and sometimes with more violence of sound than meaning. And I am not convinced that I am to impute to this person, a real desire of making his wife miserable. He is said to have threatened "to horsewhip her." On another occasion, "that he would send her to Bedlam." Only one act of real violence is imputed, but in what manner proved? The witnesses are hardly worthy of the confidence of the Court. One of them is her niece; the incorrectness of whose deposition, I am willing to impute to mere want of recollection; but still I must consider it, on that account alone (if I restrict it to that) as unsatisfactory. Another witness is a child of fourteen years of age, who may have taken a wrong impression of what passed. 27/ 318. 332.

The third, is the cook, who, from her situation in the kitchen, could know little but what she received from report; and she is likewise subject to an observation that materially affects her credit. On her examination *in chief*, she confines her description of all the foul language that passed, to the mouth of the husband; but when pressed by the interrogatories, she admits that the wife's mouth was equally gifted; that there was much wrangling between the parties, and that the one was as much in fault as the other. Another witness, a servant, Henry Dean, seems throughout to have looked to his mistress as a *femme sole*, instead of looking up to Oliver as his master. In fact, the account of all the servants, in this family, seems to have been enlisted to their mistress, in a degree that calls for much jealousy, in the Court's estimation of their credit. This very person, a very young man, is proved to have declared, in direct terms, to another witness, that if he had such a wife, he would do to her what Oliver only threatened to *do*. 24/169.

A material witness, materially discredited, is, I think, the party herself, on whose complaints the whole of the present application to the Court is founded. Here is a woman, at an advanced time of life, making a charge against her husband, "that he was the author of her own precipitate marriage." When I see such absurd complaints brought forward, I feel that strong deductions are to be made from the testimony of the other witnesses, even if no contradictions of their own were opposed. — The testimony, in support of such a case, must be extravagant and high coloured. But the fact is, that there are contradictions of their own. Margaret Thomas admits "that she does not know whose fault it was; that it appeared to be as much of one as the other." Dean tells Mary Owen, one of the most credible witnesses of the whole set, that he would use correction and restraint, if he had such a wife. To look to witnesses of higher station, Dr. Lake, who visited the family, and who does not appear to have any bias upon his mind, that inclines him to either party, speaks of her as a person of asperity of temper, and as cheerful *when not provoked*; "and he *thinks* he *must* say, that she has not a *very* bad temper." Such is the doubtful and moderate panegyric which he has to give her. He says, that when he visited them after their marriage, he cannot say that Mr. Oliver treated her with disdain; but there was a good deal of wrangling and jarring between them. There was an unhappy want of accommodation, very much increased, undoubtedly, by the unequal circumstances in which the parties were placed, which could only be removed by tempers happily formed. There is, however, nothing in the evidence to charge Mr. Oliver, with being the sole cause of 429.

these quarrels; which, owing to the situation in which he was placed, unless with a very mild and amiable temper, could hardly have been avoided.

A second witness says, "that he visited them, and this very shortly after their marriage: Mr. Oliver began to treat his wife with the greatest disdain and contempt," &c. &c. But when I find this witness, in answer to an interrogatory, speaking of a transaction happening in his own presence, I cannot think that all the inflammable matter was on the side of the husband. He says "that he was in company with the parties about January 1799, when Mrs. Oliver flew into a passion, because Mr. Oliver smiled at deponent's calling some elderly ladies, who lived at Kensington, old tabbies; and she then proceeded to reproach her husband with their inequality of situation, and imputed to him the unworthy motive of having married her for the sake of her money."—That she should be in a passion at his smiling at a thing, so perfectly inoffensive as that was towards herself, is behaviour of an extremely improper kind; and there cannot be a doubt but that the expressions made use of by Mr. Oliver, on that occasion, at least, were the consequences of that behaviour.—I will not apologise for this indecent language, nor defend the propriety of those expressions. I cannot, however, but advert to the manner in which they arose, in answer to an imputation cast on him of a very opprobrious nature: and with respect to the offence, against the delicacy of this lady, I cannot help thinking that is much lessened, when I see it in evidence, that she relates something that passed between herself, and husband, in the privacy of the marriage bed.

This is the general effect of the evidence, as applied to words of reproach: and I do not think there is that entire balance of ill conduct on the part of the husband, that would induce me to pronounce, that this lady has been causelessly insulted in the manner pleaded. The utmost, that I can allow is, that there are faults on both sides; and that the lady's temper has incurred some degree of blame, in using expressions which it would have been much better to have omitted; "that of having married a beggar, and raised him to a coach"—and such other language, as a husband cannot but feel great resentment on its being applied to him.

The next charge is, that of having used words of menace; from which the Court is to infer bodily injury; "that he would lock her up in a room, and horsewhip her, and that he would send her to Bedlam." I have already observed upon the credit due to Dean, who has spoken to this part of the plea; and I cannot but think that the story he has delivered in his deposition is highly incredible in its own nature. He says, "he came into the room while the family were at Brighton, and he observed his mistress in tears, and Mr. Oliver in a violent passion with her, which he discovered to have arisen from some dispute about politics, and that Mr. Oliver said, if she used that language again, he would horsewhip her." How is that confirmed? Mrs. Burchell speaks of no such behaviour; she thinks it arose out of the unhappy temper of Mrs. Oliver. Another witness gives a very candid opinion; she imputes the blame to both, and in the strongest terms denies, that she heard any language of this sort. The other words of menace are, that Mr. Oliver said sometimes—"that she was mad; that he told the servants to take notice of her at the full of the moon, and that they would observe a change in her." Possibly this might be the impression on the mind of the man: If it was, am I to consider it as the language of mere invective and abuse? As to the threat of sending her to Bedlam,

there are no witnesses who speak to the use of such words; but supposing them to have passed, and to be sufficiently proved, they do not prove malice; for they might be the expression of a real opinion, even though erroneously formed.

I come now to acts of violence; and I think there is only one described;—"that, in a coach in Piccadilly, he held up a knobbed stick, and, with the greatest fury, threatened to strike her;" but he did not actually strike her. It is a blind account of the matter that is given by the coachman, the only witness produced; the transaction passed after it was dark, and could therefore be very indistinctly seen by the coachman on the outside, sitting as those persons usually do. Of the commencement he knows nothing. The allegation states, "that she alarmed the coachman, and got out of the coach, and went to Mr. Pollock's house for assistance." To him she gave an alarming account of what had happened to her in the coach, but it does not seem to have alarmed that gentleman very seriously; for his advice to her was to return into the coach, and go home, which, after some repugnance, she does, and home she goes. No person is produced, whom these cries of murder must have summoned to her assistance; for every body knows, that, in this great town, a prompt assistance would be given to a wife calling upon their humanity, for protection from a husband's attempt to murder. In short, there is nothing but her own account of the matter given in the allegation. Much of that account may be imputed to nervous agitation, arising upon a contest which began in the dark, and passed in the dark; and what its real character was, must remain in the dark; for seeing how little the allegation is in general supported by evidence, I cannot confidently presume, that the unsupported representation of this occurrence is perfectly correct.

The next fact charged is, that she, being kept in a constant state of irritation, and her illness, occasioned thereby, increasing upon her, she requested him to join with her and Dr. Lake in prayer, which he refused to do, and abused her for sending for Dr. Lake; but the whole that appears in the evidence is, that when Dr. Lake came into the room, and asked him to pray with her, he declined doing so; and this he might certainly do without any impropriety, for several reasons, that might possibly dispose him to decline such an office at such a moment.

The last act of violence, and one upon which considerable stress has been laid, is that in which she is described as having received much bodily hurt; and if satisfactory proof was given of *that*, the Court would, with great alacrity, interpose to protect her against its recurrence. But it must not be said, that a slight inattention or carelessness on the part of the husband, though it may accidentally, and contrary to his intention, produce mischief, will warrant the Court to pronounce a sentence of separation by reason of cruelty. Affection may exist, though accidents may happen in petty quarrels. What is the fact? One morning, when Mrs. Oliver was going out for the whole day, or a considerable part of it, there was a quarrel about the keys belonging to the wine and ale cellars, which Mr. Oliver required. Am I to be informed, that she had a right to refuse them? and that her husband was to be deprived of those accommodations if he required them? Where does she find the law for the refusal, if she does not show any special agreement to such a strange effect? If not, surely this was conduct enough to exasperate a

husband, to the extent at least of an endeavour to obtain possession of them. In the course of that endeavour, a struggle or scuffle takes place; and in that scuffle, the weakest goes to the wall, and she is unfortunately bruised in her arm and breast against the garden-steps. But is such an accident, produced by the vexatious and unjust refusal of the wife to deliver the keys, sufficient to justify, in law, her refusal to cohabit with her husband. There is no reason to impute any malignant intention, or any other intention, than that of obtaining what he had a right to possess, and which was illegally withheld. A husband is not to be deprived of his marital rights, because a wife pertinaciously resists them; and, in the course of that resistance, encounters accidental injuries, which never were meant to be inflicted.

A good deal has been said with respect to a separation by articles of agreement: It does appear that, after this act of mutual violence, she applied to a respectable magistrate, and put herself under his protection. The advice, which he gave her, was perhaps more salutary than legal,—to proceed to such articles of agreement; the fact being, that the parties had pledged themselves, at the altar, to live together till death did them part. They pursued, however, a negotiation which finally become ineffectual, and they resort to this Court.

The only question remaining for my consideration is, whether such a case is proved on the part of the wife, as will entitle her to a separation from her husband. I am of opinion that it is not; and that she is under the legal obligation of returning to her husband, and that it is her duty to improve her mind by what has passed; and to recollect, that, having assumed the relation of a wife, she is bound to execute the duties that that relation imposes; and particularly to abstain, in future, from inordinate pretensions, and exaggerated complaints.

SOILLEUX v. SOILLEUX.—p. 373.

Divorce by reason of the adultery of the husband: Defence, that the charge amounted only to a solicitation of chastity, overruled.

THIS was a case of divorce instituted by the wife, in which the defence set up, that the facts only amounted to a solicitation of chastity, was overruled.

JUDGMENT.

SIR WILLIAM SCOTT.

This is a suit brought by Mrs. Soilleux against her husband for cruelty and adultery. The parties were married on the 5th January 1786, and they cohabited together until that separation took place, upon which the present application is founded.

It appears, that this lady kept a boarding school, for young ladies, at Kensington, and, by a very honourable industry, supported herself and six children. There are different accounts as to the contribution of the husband towards the support of his family; but it is clear, that his contribution formed a very small proportion; and that his industry was frequently of a very mischievous tendency." The general propriety of his conduct has been entirely given up;—his counsel have admitted him

to be deserving of every reprehension, and have found it necessary to stand upon a strict specific principle of law.

The libel charges both cruelty, and adultery, though the former is not insisted upon. The witnesses are all of them acquainted with both the parties. One of them, living in the house, has proved, that Mr. Soilleux's usual conduct towards his wife was extremely rude and oppressive: That he grossly abused her in the presence of this deponent, and of two scholars, and otherwise treated her with great harshness; and, at that time, took possession of her keys. In short, he endeavoured to make her life truly uncomfortable. The principal question however is, whether his conduct, as founded on the imputation of adultery, is so proved, that the Court can found any sentence upon it.

I need not remark, that, in a house like the one in question, where there are five daughters, and a great number of female scholars, the purest manners ought to be observed by every person in it; particularly by him, whose example was likely to have so much influence, from the situation he held in it. I am compelled to say, that his general conduct was as inconsistent with this obligation as possible.

It is proved, by several of the witnesses, that he, as it has been termed, *solicited their chastity*. Solicitation of their chastity is a very gentle description of the facts; for here are acts of bodily violence, which go far beyond the bounds of mere solicitation, particularly in the case of Theresa Tiellier, who was assaulted by him in the earlier part of the history, in the year 1797; and nothing but a very obstinate resistance, on her part, could then have prevented her ruin. It appears, that this witness was absolutely under the necessity of quitting the family, on account of the immodest, and brutal behaviour, and attempts of this unprincipled man; and I think, she acted with all necessary prudence on the occasion. There is nothing of malice or resentment, by which her deposition can be considered to be at all discoloured; on the contrary, she positively consults with a lady, who was a parlour boarder in the house, and who advised her not to make any representation to her mistress. She at length retires in silence, in consequence of this molestation. There is another witness who speaks to the same effect.

These witnesses are stated to be merely evidence to character; but, I think, their evidence is stronger, because they prove that Mr. Soilleux was perfectly disposed to commit the crime with which he is charged, and that he took the most active and violent measures, for effecting his purpose, and that nothing but the consent of the other party was wanting. Such consent appears, in one instance, to have been given. It is this that makes the conduct of Mary Wiltshire, the person charged, extremely material, and the evidence which she supplies stringent in the extreme; because when the criminal disposition of the man has been most satisfactorily proved, and when it is also proved, that the conduct of this female was so different on former occasions, when she had withstood his attacks,—if, after such a situation as is described in the evidence, she ceases to complain, her silence and submission furnish the strongest presumption, that his attempt here had been more successful. Mary Cromwell speaks “to going up stairs, and finding Mr. Soilleux and Mary Wiltshire in her mistress's bed-room together.” I shall not, however, enter into a description of the situation of the parties; but the state and condition were such, as authorize the Court to draw the inference that the act of adultery had been committed.

It is said, there is an inconsistency, between the account given by this witness at the time, and that which is now stated in her deposition. It does not appear to me that any such inconsistency exists. The different statements are such as any man's understanding may reconcile. How then stands the fact? The witness, on the discovery to which I have just adverted, goes away under the impression in her own mind that an act of adultery had passed. It is said, that it is only an inference,—but unless there is reason to presume that the inference is incorrectly drawn, it is almost conclusive. She immediately communicates the circumstance to Crouse, the witness. Mr. Soilleux presently afterwards comes into the kitchen, nearly in the dress in which the witness had just seen him. He calls her away, and bids Mary Crouse stay in the kitchen, which a man, conscious of what was going forward, would naturally do. What is the character of the other party? I admit, that the declaration of a *particeps criminis* would be but weak evidence in a common case; but in such a case as the present, where the criminal intention was so fully established, and nothing but the consent of the other party was wanting,—I say, the conduct of such a person is evidence of the most stringent kind, that the act, which he was always attempting to accomplish, had actually taken place. 533.4. 362.

Now, what is there in the behaviour of this person, to induce a belief that she had, in the act in question, given any opposition, and that he had been equally unsuccessful, in this as on other occasions. Before this period her master had persecuted her with the same odious addresses, and she had complained of them; but, after this discovery, she makes no complaint, nor expresses any uneasiness whatever. Is that the conduct of a person who is averse to the gross importunities of such a man? What is the conduct of the other witnesses?—Of a very different nature,—that of resistance at the time. It is said, if any persons had gone into the room, when any of the other attempts were made, they would have found exactly the same appearance, and nothing more; and that the crime was not more likely to have been committed, in this particular instance, than it would have appeared in the other. But would they not, in such case, have heard the complaints of the party? Would she not have cried out? Would she have submitted afterwards? If she had been under similar circumstances, would it not have been known? But, in this instance, there was no representation to the other witnesses, of the manner in which she had been treated. If the fact had been perpetrated, and without her consent, would she not have remonstrated against her master? That is the natural and necessary conduct of an innocent woman in such a situation; but when all complaints had subsided, what am I to presume, but that the resistance had been totally subdued.

Under these circumstances, I am satisfied that this is no case of *solicitation of chastity*, but that it is an act of adultery, as sufficiently proved as the law of evidence, in this Court, requires. Here is a person continually exerting his wicked industry in order to accomplish his purpose, who did not succeed in every instance, because there was a firm opposition; but, I think, it is impossible for any man, reading this evidence, and looking at the different parties examined, to entertain any doubt, either in his private or his legal conscience, that in this particular instance he had triumphed over the weak resistance of this woman, and had actually committed the fact.

Here has been no defensive plea: The interrogatories, however, ad-

ministered on the part of Mr. Soilleux, insinuate calumnies of the grossest and most unfounded nature against his wife, and against another person equally innocent of the charge. I cannot but consider this as a great aggravation of his misconduct. It appeared that he had charged his wife with improper behaviour with Mr. Tomkins; but afterwards, by his letters to Mrs. Soilleux, he attributes it to the effect of jealousy, and speaks of her in terms of the greatest esteem and approbation. If he felt himself bound in justice to retract in this matter, why were these interrogatories administered, tending to throw aspersions upon the conduct of innocent persons? This is a continuation of the atrocious conduct, which has marked the character of this man throughout. The Court, under these circumstances, cannot entertain the least doubt, that the wife is entitled to the remedy which she prays; and it therefore pronounces for the divorce.

With respect to the costs—the only ground on which it is possible to say that Mrs. Soilleux would not be entitled to her whole costs, is, that she pleaded matter which she has not proved.—If it could be shown that she had done so wantonly, it would affect a part of the costs, though there is no reason to say that it would affect the whole. But I am far from thinking that there was no reason for such inquiry, although it may not have been in her power to find the necessary proof; I think therefore no *mala fides* has been shown.

As to her having an independent income, and he being destitute, that is no reason why she, having applied for redress to the Court, and having established her case, should not be entitled to her costs. The insufficiency of the fortune of Mr. Soilleux must be left to his own consideration, as it is his own misconduct that has made him liable to this judgment.—I shall therefore condemn him in costs.

STEPHENSON v. LANGSTON.—p. 379.

Parochial offices. Non-resident partner, in a house of trade, not exempted from serving the office of churchwarden.

The Office of the Judge promoted by 527-34.
BURGESS v. BURGESS.—p. 384. > 52, 32, 187.

Incest.—Office of the Judge against parties living in incestuous cohabitation. *Separation. Penance.*

WAKEFIELD v. MACKAY, falsely calling herself WAKEFIELD. p. 394.

Suit of nullity of marriage, by reason of publication of banns in a false name, not sustained by the facts.

KIRKMAN v. KIRKMAN.—p. 409.

Divorce, by reason of cruelty, inflicted by the wife on the husband, sustained.

THIS was a case of divorce, by reason of cruelty, brought by the husband against the wife, "for violent and outrageous treatment," as set forth in the libel.

JUDGMENT.

SIR WILLIAM SCOTT.

This is a suit instituted by the husband for separation, by reason of cruelty, and harsh and violent treatment, alleged against the wife. The Ecclesiastical Court is, in general, averse to relax, in any degree, the duties of the contract of marriage; and particularly to release married parties from the obligation of cohabiting together. It will not do so for mere words of abuse, however reproachful.—The persons of both parties, however, must be protected from violence, and I cannot accede, to what has been said in argument, that the Court should wait till there has been actual violence of such a nature as may endanger life. It is not to pause till a tragical event has taken place. Words of menace, if accompanied with probability of bodily violence, will be sufficient. It may be enough if they are such as inflict indignity, and threaten pain. It will be the duty of the Court to say, that the suffering party is not obliged to continue in cohabitation under such treatment.

I am unwilling to go through all the depositions which describe the unhappy scenes in this family. It will not be necessary—as it is perfectly clear, that there have been words of menace, with acts of violence accompanying them. It is said, that they were caused by "jealousy."—All the evidence tends to establish, that there was no foundation, in the conduct of the husband, for feelings of that nature. If such feelings were entertained, with or without reason, jealousy is a passion producing effects as violent as any other passion, and there will be the same necessity to provide for the safety and comfort of the individual. If that safety is endangered by violent and disorderly affections of the mind, it is the same, in its effects, as if it proceeded from mere malignity alone; it cannot be necessary, that, in order to obtain the protection of the Court, it should be made to appear to proceed from malignity. The evidence establishes, that these parties had gone on, in this unhappy way, for a considerable time; and that after some short separation, they had been reconciled—but the same unjustifiable conduct ensues again: though he conducted himself with the same forbearance which he had uniformly shown under the "atrocious" treatment to which he was exposed.

The sister of the wife states, that, on a former occasion, she saw the husband striking the wife, and that the deponent desired her to withdraw, and not stay to be killed. But what follows—The wife (the injured party, according to that account) applies to the husband for reconciliation, promising amendment, and that the same scenes shall not be renewed. The account given by the sister, therefore, is not very consistent with what is the substance of all the evidence, which we have just heard read. The parties were separated, however, and came together again; and if the wife had fulfilled her promise, due care would have been taken of the peace of a numerous family, to whose education and advancement the attention of both parents is equally necessary." But

455. "Parenti," c. 6. 2. 34. 35. v. 17. Conn. 104, 5, 6.

11. 10. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

the same behaviour is repeated in the grossest reproaches, attacks on his person, and forcible exclusion of him from his own house. If this insulting and outrageous treatment has proved too strong for his forbearance, and may have extorted forcible expressions from him, it is not matter of surprise. I do not remember ever to have seen a case of grosser misconduct, though I abstain from enumerating all the particular facts that are described in the evidence." A few instances may suffice. Mary Asseter, a servant in the family, says, "that she lived with Mr. and Mrs. Kirkman about six or seven months; that they appeared to be very unhappy with each other; that Mrs. Kirkman very frequently insulted her said husband, and called him *rogue, villain, blackguard, dirty dog*, and other still more opprobrious names, and told him he was too familiar with the deponent, who, she said, was his bunter, &c.; that he would, in a kind and indulgent manner, endeavour to convince his wife of her impropriety of conduct: but, notwithstanding all he could say, she continued to behave as before; that a short time before she quitted the family, she well remembers her seeing her *strike him a blow in the face, and tear his cheeks with her nails*, and she was only prevented from committing further personal violence upon him by an uncle of Mr. Kirkman coming in, and holding her by the shoulders by force; that the said Joseph Kirkman since had told the deponent he would not live with his said wife, but for the sake of his children, for he *was really afraid of his wife*; that, on another occasion, she tore either his coat or waistcoat, and she verily believes, he lived in a constant state of fear and apprehension, from *"the violent and outrageous conduct"* of his said wife." 352.

Edvard Wileke, his foreman, in his business of a harpsichord-maker, says, "that he was present when the said Mary Kirkman, without any just cause whatever, abused her husband most grossly, and used very bad language towards him, and accused him of being improperly connected with his female servant, who was a woman of very disgusting appearance, and she called him all the blackguard names she could think of, and that she prevented the servants from opening the door to him when he was out;" and deponent further says, "he was once present when she held *"a poker"* in her hand, being then in a violent passion, and threatened to strike her husband therewith, but she did not; that he also once saw her scratch her said husband's *face with her finger nails*, which made his face bleed; that, on another occasion, he went into the parlour, where he found Mr. and Mrs. Kirkman alone together, she being in a great rage, and a *pewter quart pot* was then lying on the floor, which the said Kirkman told him that Mrs. Kirkman had struck him upon the head with; and deponent further says, that, in a few minutes after, he saw her go up to her husband, without saying a word, and, with her finger nails, tore and scratched his face, which put him to great pain; that one evening, some time in December 1793, he perfectly recollects Mr. Kirkman showed a place, which afterwards became sore, under one of his eyes, which appeared burnt, and had some tallow grease upon it, which he said Mrs. Kirkman had burnt by *thrusting a lighted candle into his face*." 352.

Joseph Kirkman, the son of these parties, sixteen years of age, is also produced as a witness to the unhappy state of his family, and speaks with a very credible degree of impartiality respecting his mother's conduct; for he bears testimony to her extreme kindness to her children,

when he says, "that no woman can behave with greater tenderness to a child, in its infancy, than she has done to all of them;" but he deposes, "that his mother was in the constant habit of insulting his father, without any provocation, frequently accusing him of improper conduct, and calling him *white-faced villain, French villain, scoundrel*; and that when his father had endeavoured to remonstrate upon the impropriety of her behaviour, she has continued her abusive language, adding, 'Do you want to teach me? I shall do as I like.' "(a)

This evidence most clearly establishes, that the wife is not mistress of her own passions; and the Court would be wanting in due attention to the safety of the injured party, in this case, if it did not pronounce for a separation as absolutely necessary for that purpose.

(a) Other witnesses depose to a similar effect:—Ann Connor says, "that, one evening she saw Mary Kirkman strike her husband a *strong blow on the face with her clenched fist*, and that a night or two after, she saw her again strike him in *anger, and with violence*."

Elizabeth Tilser says, "that Mrs. Kirkman's temper was a most *terrible one*, that she was constantly abusing her husband violently, and calling him a *German brute*, and that, one afternoon, she heard a great noise in the parlour, and that Mary Kirkman called out to her eldest son, '*Joe, Joe, come and see what your pretty father has done, he has scratched his face, and says I've done it*.' That the said Mary Kirkman afterwards confessed to deponent that she had so done." The witness further says, "that Mrs. Kirkman locked her husband out of his own house for *three successive nights*."

Caroline Kirkman, one of the daughters, says, "that her said mother behaved in an outrageous and violent manner to her said father, and greatly abused him, and that she has often seen scuffles between them, and once saw her mother *fling a spoonful of child's pap* into her father's face."

The libel had pleaded, "that she had damaged a *valuable grand piano-forte, by striking it repeatedly upon the keys*."—But the Court rejected the article, observing, "that such conduct might not unfairly be considered as cruelty to her husband, being a wanton abuse of his property; but that it did not think it quite sufficient to plead a single act of that kind, done in a moment of passion."

TURNER v. MEYERS, falsely calling herself TURNER.—p. 414.

Nullity of marriage, by reason of *insanity* of the husband, brought by himself after his recovery, sustained.—Former proceedings on the part of the father not admitted; the son being of age at the time of marriage.

THIS was a case of proceeding to annul a marriage, on the plea of insanity, instituted on the part of the husband, after his recovery.

JUDGMENT.

SIR WILLIAM SCOTT.

This is a suit brought by a man to set aside his marriage on the ground of his own incapacity at the time alleged, though, at other times, he is pleaded to have been capable. The suit (a) was first brought by the father,

(a) In a suit instituted by Samuel Turner, the father of the present plaintiff, to annul this marriage on the same grounds that were now proposed, it was objected, on the part of the wife, that the father had no right to bring such a suit, the son being, at the time of marriage, of age, and *sui juris*, unless appointed committee of his person. The Court having taken time to deliberate, observed—That the suit was brought by the father to annul the marriage of a party of competent age, without setting up any special interest, but averring the insanity of the son at the time; the fact being pleadable, the only question is, whether the person before the Court is the proper person to plead it.—It is not alleged that the son is *now* insane; and though under the care of his father, that may be only for weakness, as it is allowed a commission of lunacy cannot be obtained—He is then to be presumed sane, and, as such, capable of bringing suits

but the son being of age, and there being no means of making the father guardian, or *curator ad litem*, the Court was of opinion, that the suit could not proceed in that form.—It has therefore since assumed its present shape.

It is, I conceive, perfectly clear in law, that a party may come forward to maintain his own *past* incapacity, and also that a defect of incapacity invalidates the contract of marriage, as well as any other contract. It is true, that there are some obscure *dicta*, in the earlier commentators on the law, [1st Phillimore's Rep. p. 90. 1 Eng. Eccl. Rep. 47.] that a marriage of an insane person could not be invalidated on that account, founded, I presume, on some notion, that prevailed in the dark ages, of the mysterious nature of the contract of marriage, in which its spiritual nature almost entirely obliterated its civil character. In more modern times, it has been considered in its proper light, as a civil contract, as well as a religious vow, and, like all civil contracts, will be invalidated by want of consent of capable persons. This has been fully determined in a case before the Delegates, *Morison v. Stewart*, falsely called *Morison*, 1745, when the effect of all these *dicta* was brought before the Court, and it has been since acted upon in various cases (*Cloudesley v. Evans*, Prerog. 1763. *Parker v. Parker*, 1757,) in this Court; which it is unnecessary to review. I take it to be as clear a principle of law therefore, at this day, as any can be, and as incapable of being affected by any general *dicta*, which may be found

proprio jure:—no man can be plaintiff for him—he must complain;—no man can be defendant for him, he must defend himself;—no one can be attorney or procurator for him, but by his own appointment.

On what ground, then, is the interference of the father to be supported? An analogy to other cases has been relied on, where a *concursum actionum* is allowed. In cases of minority there is a concurrent right, the law gives the father a right of consent, and to the minor a right of protection under his father's judgment. Cases of consanguinity have been also mentioned; but in those the public has an interest—to abate a scandal. The criminal suit is open to every one, the civil suit to every one showing an interest; but, in that respect, the father is by no means privileged; as he must show a specific interest as well as any other person—in that case there is a reason for the interference of others, as the marriage can only be affected *inter vivos*; for if the death of either of the contracted parties takes place, the marriage cannot be set aside—here there will be no such consequence, as the remedy may be pursued at any time, only with a little less convenience perhaps than when the whole matter is recent.—To this asserted convenience of the parties, many considerations of inconvenience might be opposed.

It may indeed be questioned what degree of evidence, that could be now produced, would satisfy the Court that the act was the act of an insane moment, when the man, who as I have before observed, is not alleged to be insane, and who must therefore be presumed to be himself, has taken no step to annul the act, but rather adheres to it.

In cases of most inveterate malady, there are lucid intervals, on which legal acts may be founded. The case of *Cartwright v. Cartwright*, Sanchez, lib. 1. disp. 8. num. 15. *et seq.*, was a strong case of this kind, in which the will was made in one of these lucid intervals, and was established.—There, indeed, the sanity of the moment was, in a great measure, to be inferred from the internal character of the wisdom of the act itself. This act undoubtedly has no such character of wisdom, being the act of a man connecting himself, in marriage, with a common prostitute, without any rational prospect of happiness. But it will not be conclusive, certainly, against the sanity of the act, that it was an unwise act. The man, in the best exercise of his reason, might not be a wise man; and the question here is as to the sanity of the act, not the wisdom of the party; and I am of opinion, that no evidence would be sufficient to induce the Court to pronounce against the sanity of an act, to which the man himself, not disqualified by proof of insanity, adheres, and from which he does not himself pray to be relieved. On the whole, therefore, I think the father has not a *persona standi* before the Court, and that his suit must be dismissed.

in writers of earlier periods, as any fundamental maxim, on which the Courts are in the habit of proceeding.

When a commission of lunacy has been taken out, the conclusion against the marriage will be founded on that statute, 15 G. 2. c. 30; where there has been no such commission, the matter is to be established on evidence. The statute has made provisions against such marriages, even in lucid intervals, till the commission has been superseded. In other cases, the Court will require it to be shown by strong evidence, that the marriage was clearly had in a lucid interval, if it is first found that the person was generally insane.

Madness is a state of mind not easily reducible to correct definition, since it is the disorder of that faculty with which we are little acquainted; for all the study of mankind has made but a very moderate progress in investigating the texture of the mind, even in a sound state. In disease, where it has pleased the Almighty to envelope the subject matter in the darkness of disease, it will probably always continue so; but the effects of this disordered state are pretty well known. We learn from experience and observation all that we can know, and we see that madness may subsist in various degrees, sometimes slight, as partaking rather of disposition or humour, which will not incapacitate a man from managing his own affairs, or making a valid contract. It must be something more than this, something which, if there be any test, is held, by the common judgment of mankind, to affect his general fitness to be trusted with the management of himself and his own concerns. The degree of proof must be still stronger, when a person brings a suit on allegation of his own incapacity, by exposing to view the changes of his mind.—Under these observations, I shall proceed to examine the evidence, which, in substance, I think I may now say, is sufficient to establish that this gentleman was a person liable to accessions of lunacy.

He appears to have lived with his father, who was a grazier in Lincolnshire, and, about thirteen or fourteen years ago, to have been visited with insanity, which became more frequent in its visitations, more especially in the spring and autumn; which is not unusual. The general fact is fully established by the witnesses, particularly those of his own family, his father, his two sisters, and a brother, who was a medical person, and attended him in that capacity at different times. His father did not trust him with any business; he was at liberty, but entirely unfit to be employed. His peculiar humour of madness was, that of passion for a military life, for which he had no disposition at other times; but, at the periodical returns of his malady, he exhibited such flights of heroism, and such general expressions of ideas on that subject, as strongly marked a disordered imagination. His father once offered to procure for him a commission in the army, which he declined, and said, that he would prefer to follow his father's business.

This is the description of several witness, who have known him from his infancy, and which brings down this account of him till 1803. It is sufficient, therefore, I think, to throw on the other party, who sets up his act as the foundation of any right, the burthen of proving that it was done at the time of sanity; more especially, as it appears that it was done in September, at one of those periods of the year, when he was habitually most subject to his disorder. This brings me to examine the

facts attending the marriage. It appears that his father, (a) who has been produced as a witness, had given him leave to go to a show of cattle, in order to amuse him; that he took that opportunity of eloping to town without money and without preparation; that he told his friend he was going into the neighbourhood of Nottingham, and should return; but he did not: he went to Newark, and on to London, without any other purpose than that of indulging the military notions, which he usually entertained in his fits of insanity. He is described, by one of the passengers in the same carriage, to have been giddy and flighty, very communicative about his family, as persons of property, but frequently contradicting himself; speaking to every person whom he met, and particularly to women, and calling to any person that he saw at the window. This witness deposes, that at first he supposed him only to be wild and thoughtless, but afterwards he considered him to be deranged. This is a description of very extravagant behaviour. On his coming to town, on the 9th of September, he met this lady for the first time, as it is admitted by Mrs. Turner in her answers, who was then Sarah Meyers, but passing by the name of Mrs. Lee. He first became acquainted with this woman, by accidentally meeting her in the street, somewhere near one of the Theatres Royal.

Her servant, Susannah Squire, says, "that, on Friday, the 9th of September, he came with her mistress, who lived in Ann Street East, and that almost immediately she heard him say to her mistress—'he could not live without her.' That her mistress then proposed 'that she should go to church with them,' and on the Monday following Mr. Turner obtained a licence, and on Wednesday they were married." Here is an offer of marriage at once to a perfect stranger.—One has heard of the extravagant effects of love at first sight.—This is conduct, which, if it stood alone, might be only an act of a very weak person, and might not be sufficient to proclaim a man absolutely mad or lunatic: it is certainly, however, symptomatic; and if fortified by other acts, may lead to a different conclusion.

The next witness, on whose evidence I shall observe, is Mr. Parry, a banker in Birch Lane. He says, "that, on the 9th of September, Mr. Turner called on him, and obtained some money, 15*l.* on the very morning of his coming to town. On the 10th, he came again dressed in an officer's regimentals, and told him that he had come to town to purchase regimentals for a troop of horse, on which he had expended 400*l.* and wanted more money. That not suspecting him to be deranged, he gave him 50*l.* That his interview was short, and he cannot take on himself to say that he was insane." Mr. Parry, junior, speaks nearly to the same effect—"that he did not think him mad; that he was not acquainted with the manner in which he was usually affected with military ideas; and though it might surprise him, it did not occur to him that such behavior proceeded from madness. The next day he called

(a) *Consist.* 27th June 1817.—In the case of *Sumerfield v. Mackintire*, as to the competency of a father, to be a witness, who had originally instituted proceedings (to annul the marriage of his son) which were continued by the son, on his coming of age: An objection to the competency of the father to be a witness, was over-ruled by the Court, observing, "that the son's intervention in the suit was a supercession of the father, and that by taking up the suit, where he found it, he had adopted and sanctioned all that had been done. For the sake of greater regularity however, the conclusion of the cause was rescinded, to enable the father formally to withdraw himself from the suit, and then, with his wife, to be repeated to their depositions."

again, and said, he was going to be introduced to the King; but still he did not think him mad." This opinion of the witness does not weigh much with the Court, knowing, that insane persons are frequently affected with such notions of connection with great personages, when no such connection exists.

It is alleged, on the part of Mrs. Turner, "that she was the cause of this inclination, on his discovering that she was particularly fond of the military profession, from seeing the locket of a military officer in her possession; and that he affected their habits from a wish to recommend himself to her." But this could not have been the cause of them, since they appeared in his first conversation with Parry, before he had seen her, and with his fellow-traveller on the road. Mr. Parry, junior, says, that the next day, a young woman came to enquire about his character, with a card of reference of a description very wild:—"Royal Army of France, Captain Jonathan Turner, of the Royal Guards.

Mr. Nicholls also gives an account of a visit to him, "that he dined with him, and talked of orders for military clothing, and took leave very abruptly; that, two or three days afterwards, he dined with him again in a cavalry uniform, and said, that he had orders to provide clothing for the whole regiment, and that he wished to be recommended to an army tailor; that he got up in a hurry, and in a low voice said, that he had been a lucky fellow, as he had met with a young lady of fortune, who had fallen in love with him, and that he was going to be married to her; that he went away abruptly, and he then concluded that he was insane."

Oakley, the sister of the woman, says, "that on Monday he was very desirous to marry her sister; that he went for the licence, and was married; and that, during the ceremony, there was perfect propriety of behaviour; and that he was perfectly rational, and that it was his own free act." The Clergyman and the Clerk also depose to the propriety of his behaviour. Much stress, however, is not to be laid on that circumstance; as persons, in that state, will nevertheless often pursue a favourite purpose, with the composure and regularity of apparently sound minds. It is in the extravagance of the act itself, rather than in the manner of pursuing it, that the proof of madness is to be discovered. There is then a letter exhibited, which was written by him to a friend of his father, which has been called for by the wife, and has been produced; but it breathes madness in every line: it describes the lady as the daughter of an officer in the Prince of Hesse Cassel's regiment; and says, "that if his family renounce her, he had engaged to give him a commission in a regiment of dragoons; and that, as soon as he should receive their answer, he should take a captain's commission in the Prince of Conde's body guards," &c. The same disordered idea prevails throughout.

Other persons are examined on the part of the wife, who never saw much of him. There is the Hairdresser, who dressed his hair once or twice; and the Victualler, who supplied him with dinners; and a person discharged by the wife from debt; and others whose information is much too slight to weigh against the rest of the evidence, which so strongly proves the influence of disorder on his mind.

Mr. Leadbeater, the friend of his father, describes his conduct when he prevailed on him with difficulty to come to his house, till his father could arrive to take care of him. When the father comes, he is sepa-

rated, but undoubtedly expresses a great affection for his wife. When he goes into the country, the same history proceeds. He was put under the care of Mr. Fawcett, who proves, that he was deranged for three weeks after, and that he was again, the next year, at the same period.

On this evidence, I am of opinion, that it is sufficiently proved that he was deranged at the time of the marriage, and that I am bound to pronounce the marriage null and void.

The Office of the Judge promoted by

BISHOP, H. M. Procurator General, v. STONE.—p. 424.

Proceedings under the stat. 13th Eliz. c. 12. against a Clergyman, for preaching doctrines contrary to the articles of religion.—*Deprivation.*

COPE v. BURT, falsely calling herself COPE.—p. 434.

Suit of nullity of marriage, *by licence*, by reason of the false description of names, not sustained.

CHAMBERS v. CHAMBERS.—p. 439.

Divorce by reason of adultery. Recrimination of cruelty, as alleged on the part of the wife, not sustained.

THIS was a suit of divorce, instituted by George Chambers Esq. against the Honourable Jane Chambers, his wife, by reason of adultery.

JUDGMENT.

Sir WILLIAM SCOTT.

The citation in this cause issued in Michaelmas Term 1804, against the Honourable Jane Chambers for adultery; to which no appearance was given till Hilary Term 1805, after excommunication. A marriage had taken place in 1784, at Gretna Green; and the consent of parents being afterwards obtained, the parties were married again in Yorkshire for confirmation of the former marriage: they cohabited till 1799; but not without occasional disagreements and separations. In 1798, the wife absented herself from her husband, and took refuge with her brother, Lord Rodney; articles of permanent separation were entered into; which have not been exhibited; but described to the Court as providing, that, "on the first instance of ill treatment after her return, of which she was to be the sole judge, she should be at liberty to separate; taking with her their two children, without forfeiting an annuity, which had been left her by Sir William Chambers, the father of her husband, on condition that she should be constantly living with him."

In 1799 fresh feuds arose: she went away, as it is said, irrevocably; but consented to return to his house for the purpose of taking care of the children, during his absence on military service; and, as she says, with a condition that she should have previous notice of his return. This, however, is denied in his answers on oath. The husband returned

without notice; and the libel pleads that she eloped; but whether this is a term properly used, may depend on the agreement under which she claims a right to retire. Till that time, or shortly before, the character of Mrs. Chambers was unimpeached; but the libel charges a departure from that character as having commenced with Mr. Caulfield, at Hartford, near Huntingdon, during the husband's absence, and afterwards at other places till 1809, when an action was brought against Mr. Caulfield, on which a verdict was obtained of damages to the amount of 2,000*l*. A counterplea has been given, in this suit, on the part of Mrs. Chambers, nearly a year after the libel, averring many things, some insignificant, some important; and reciting the article of the libel, charging elopement, it explains and justifies that fact under the articles of separation.

This plea describes the situation of Mr. Chambers to be one of much pecuniary embarrassment. In it she charges the husband with the profligate design of getting rid of her, by a charge of adultery,—with a constant and causeless jealousy of her conduct with persons, whom he himself had introduced; and concludes with charges of adultery against him with several persons, and particularly in one instance, that must be regretted that it should be dragged into this suit. It states also, that he had made a proposition to her for a separation, to be collusively obtained. This is denied, in a further allegation on the part of Mr. Chambers; and it is there alleged, that she wrote a letter to him proposing, that he should give up the demand of damages against Mr. Caulfield, and she would abandon all opposition to his suit. There have also been three exceptive allegations.—Mr. Chambers' libel ends with the usual prayer for divorce. The allegation of Mrs. Chambers contains no prayer; but, at the hearing of the cause, a prayer is made for separation on her part, and on supposition, as I must presume, that her innocence, and his guilt, should be established. On that prayer, and indeed on every other view of the cause, the first point, which the Court has to establish, is the innocence of her conduct.

Nine witnesses have been examined, who, if they are believed, amply prove the charge of adultery against her. It is proved, by three or four witnesses, that Mrs. Chambers came to Hartford soon after her husband had left England for the Helder; and that Mr. Caulfield visited her there, and dined and supped there almost every day; and their account fully proves to what a degree of intimacy, their acquaintance had ripened at that time.—They were seen walking in retired places.—He came familiarly to her dressing room, before she had finished dressing, under pretence of washing his hands, when she sent the witness away.—She

272. * was not attended at night by her maid-servant as usual.—The door was locked in the morning.—His boots were observed to be clean in dirty weather, when he came to breakfast; it was believed, that he had then been secreted in the house; and, on one occasion, he was seen getting over the paling of the garden, when he must have come from the house.

One of the servants says, "he saw conduct which he should have thought very improper in his own wife." If the witnesses are not discredited, how is this answered? By mere negative evidence of other persons, who say they were present, and saw nothing improper. But

1st 211. of these, one is the maid-servant, usually employed in the kitchen, who cannot be supposed to have had many opportunities of making observations. Two others are the sisters of the defendant in this cause, whose

311. 450.

evidence the Court would be unwilling to examine minutely, as they may be presumed to be biassed by their affection to her, and by an excusable tenderness for their own characters. When, however, these witnesses say, "that they were always with her, and never left her for five minutes," which are the words of the plea, they must be understood with some latitude. If such watching did really exist, it could be only in consequence of some previous suspicion; but, in truth, it did not exist. They do not say that they slept with her, which would allow an interval of eight hours at least, and at a time that might be most material.—There is also evidence from other persons that she was seen walking with *him* to Huntingdon, and without *them*. The sisters must be understood, therefore, as only expressing, that they were much with her, but, in such a way, as might allow opportunities for every thing, which is stated to have passed by other witnesses. As to the object of his visits, it could not be equivocal, or supposed to be directed towards one of them, as an honourable purpose of that kind would be soon declared, or he would be speedily dismissed.

The subsequent history is carried on in various places, to which she removed, and with no great accuracy, either in the plea or in the proof, as to dates. When she quitted the house of her husband, she is described to have gone off in great exasperation; and, as I think, it appears, from some dispute on account of Caulfield. One witness says, "that the husband was particular in his inquiries respecting her conduct, when he came home;" and though this was a stormy period between the parties, as no other cause of jealousy appears, I think she must have been aware that Caulfield was the object of his jealousy, as she could not but know the sentiments of her husband respecting him. She knew that he was subject to fits of jealousy, and that it was excited by her intimacy with this individual. What would have been the conduct of a virtuous woman under such circumstances? The dictates of common discretion would have led her to avoid all private communication with him. On the contrary, he is continually with her, even up to the time of the verdict in 1809.

It is said that there was the same intimacy with other persons, who were the friends of her family. But in what sense can Captain Caulfield be considered in any such character? He was a young officer, casually introduced to her acquaintance by her medical attendant in the country, totally unknown to her brother, and only known to her husband as an object of disgust, and a cause of uneasiness. In what sense was such a person the *friend* of her family? In her own allegation it is stated, "that on one occasion Caulfield was sitting with her and her sister at twelve o'clock at night." The husband called, and she desired Caulfield would go into another room whilst he was there. Why should this have been done, if it was a matter of indifference to the husband? It is admitted, that he continued there after the husband was gone, and after the sister had left the house. The sister says, that he staid till she had finished a letter, which he was to send by the coach. It is proved, that the letter was not so sent; and I cannot but think, that the sister might have staid that short time. Indeed, there could not be a more flimsy pretence for detaining him; and the servant maid says, he staid all night. Then it is said, that this might be mere imprudence, and nothing more;—and that the Court does not judge on such grounds, but on clear proof of guilt.

There may be, I must observe, imprudence of different kinds and degrees, and there are degrees of imprudence, from which a Court of Justice will infer guilt. Here are visits, which are described by her confidential servant, Sarah Calderwood, as made in such a manner, that did not deceive her. At Farnham, near Bury, the same witness says, "that he had a bed in the house constantly for three quarters of a year." Another witness says, "*he lived there.*" For a long time, wherever she is, he is there also; and there is one consideration, which extends over the whole history, which is, that here is a young woman separated from her husband, and a young officer constantly together. They are living in the same house, though under the bare appearance of separate beds. What is this state of cohabitation? I am not afraid to say, that separation might justly follow from this alone, and that this might be the legal proof from which the Court will presume guilt; for Courts of Justice must not be duped. They will judge of facts, as other men of discernment, exercising a sound and sober judgment, on circumstances that are duly proved before them. That a young woman, estranged from her husband, and a young officer, should be living together for months, and at different places, though under the flimsy disguise of separate beds, and that Courts of Justice should not put, upon such intimacy, the construction, which every body else would put upon it, would be monstrous.

What would be the condition of husbands under such restraint on legal conclusion? It however does not depend merely on the reason of the thing. It is the doctrine acted upon by the Court of Arches, and in the Court of Delegates, in the case of Rutton v. Rutton, Arches, 26th Jan. 1796, Delegates, 14th Nov. 1798, in which there were separate beds, and scarcely any proof of a fact of adultery; also, in the case of Lord and Lady Cadogan, (a) in which there were separate beds, and in *H260. Denniss v. Denniss*, Consist. 25th Jan. 1808, in all of which the same doctrine was referred to. These are authorities which sufficiently support that position, if it were necessary to act upon it. But the evidence goes further in this case.

There is an occasion stated, on which she was compelled to take a house in the name of some other person, and whose name of all others does she adopt?—that of Mr. Caulfield. The history also traces them to a cohabitation at Chertsey, which I may almost say is admitted, since it is acknowledged by her own witness. The keeper of a lock-up-house, in which she was confined, says, that she always slept with him there; and though some attempt has been made to discredit this witness, by proving, that she did not come in a chaise, or in the particular manner which he describes, the variation weighs but little against the general effect of his evidence.—There is also the verdict, which, though no legal demonstration of guilt against her in this suit, the Court will not lightly appreciate, more particularly as it must have led her to know, that she had been dishonoured by the imputed connexion with Caulfield.

47. 50. What then was the natural conduct of an innocent woman under such circumstances? To avoid the man with whose name she herself was coupled in dishonour—to regain her own character; this would have

62. (a) Consist. 9th Feb. 1796. Vid. [post] *Loveden v. Loveden*, where this case is more particularly noticed.

been not only her sense of duty; it would have been the natural impulse.—But what is her conduct? The Court might expect, that it would be impossible that Caulfield could ever find admittance to her again. Yet, in her own allegation, she states, that he did visit her, but only as other gentlemen, the friends of her family. I have observed on a similar conduct before. It is out of all natural credibility, that she could admit, on such terms merely, a man by whose imprudence and treachery she had been involved in so severe a calumny. After this admission, it is almost unnecessary to examine into the credit of those witnesses, who speak to cohabitation there.

The objection to the witnesses is, "that they stole some articles belonging to her, and told lies respecting these imputed thefts." This Court cannot try such charges. The only notice which the Court can take of these objections to their credit, is to judge, whether the accounts they give, are inconsistent and irreconcilable.—I think they are not, and that the character of these persons, as witnesses in this cause, is not substantially impeached. After the admission of his visits by herself, I have no doubt, that the cohabitation did take place, which these witnesses describe. It appears further at this period that her sisters had ceased to visit her. What could have produced that estrangement? Here was a woman of noble family, ill-used by her husband, consigned to dishonour by the verdict, and in pecuniary distress! What situation could more loudly call for the support of her family?—This has been her conduct out of the cause. What has it been in it? She was called upon by every motive to vindicate her honour, which had been impeached. A suit of restitution of conjugal rights would have put her innocence in issue; and if that was inconsistent with her feelings towards her husband, yet when he brought the suit, she would at least have been eager to vindicate herself. But no appearance is given for her but after excommunication.

In the subsequent pleas, a letter has been introduced, which, whether written in 1805 or 1806, is immaterial. She had alleged, that her husband had made application to her for a collusive separation, and that she wrote to him in 1805,—to which he says, that it was not in 1805, but in 1806. He had erroneously considered this letter, as connected with one, which was said to have come from her; but that is inaccurate, as it appears rather to have been an original proposition, and weighs strongly against her. Blasted as she was by a calumnious verdict, she had now the opportunity of appearing in a Court, where she might vindicate her character. But what is the letter? "If you will give up the damages against Caulfield, I will give up my defence in the Ecclesiastical Court; I have proofs against you which shall be brought forward before the Court, and before the world, unless you comply." What is this proposal? but that she will confirm the witnesses of whom she complains, and the verdict, which has consigned her to disgrace; and for what? to save from damages the man coupled with her in this reproach. It is morally impossible that such a letter could have proceeded from an innocent person. Two days afterwards she retracts indeed; but the offer had been rejected, as it had demanded an immediate answer, and none had been sent. This was equivalent to a refusal; and her object, in the second letter, could only be to take off the effect of the first. This letter states, that she had been led to make the offer out of Christian compassion for an unfortunate man, who was reduced to the brink of ruin

by subornation of perjury,—but yet she was willing to confirm this verdict.

67, 8. She speaks also of his continued friendship for her, almost admitting the continued connexion, and saying, that no selfish consideration would weigh with her. What! not the vindication of her own character, the best and purest of motives. In the whole of this transaction, I see nothing but the effect of blind passion: I have, therefore, no doubt on the nature of this cause; since these letters are admitted to have been written by her, and it is impossible, that they should be the letters of an innocent woman.

69. It is not necessary after this, that I should minutely examine the character of some of the witnesses. Sarah Calderwood admits her own infamy, in coming, on her second examination, to contradict the first. But I am inclined to believe the first from the tenor of it. It is not a lumping deposition, but discriminative on particular points; and I cannot believe the excuse which she makes for it, “that she was a young woman reduced to such penury, as to be obliged to eat the bread of perjury, by swearing against her mistress;” and I advert to this evidence chiefly to make an observation, which I wish to be remembered;—that those who conduct suits here, are answerable not only for their own delicacy, but, in some degree, for that of those whom they employ. There is another witness, Liddell, to whom the objection is more slight, as she says only, that her former opinion had given way to later experience.

52. On the whole of the evidence, I am compelled to say, that the charge of adultery of the wife is fully proved, and that the contrary evidence is meagre in the extreme, except that of the two sisters, to whom many considerations of tenderness are due: And that the conduct of the wife, both in and out of the cause, can only admit of one unfavourable conclusion of guilt. It is impossible, therefore, to comply with her prayer, because, her guilt being proved, she cannot obtain any thing more against her husband than a dismissal from his suit.

84. The question, then, which is next to be considered is, whether there is any thing proved by her which will bar him from obtaining his prayer. H. 381. Different grounds are alleged; first, the profligate declarations that he wished to get rid of his wife by her adultery; that he had introduced young men to her, and knew of an improper intercourse between them, which he permitted to go on. But the only witnesses to this charge 114.446. are the two sisters, and the expressions are those of violence and passion, and referable to jealousy. There is no proof of any overt act of such conduct, to induce me to believe that it was ever attempted. Almost the only evidence of toleration on his part, is in the lateness of the suit, which, he says, arose from pecuniary distress; and the only question could be, in which of the cases this toleration was shown. Supposing some delay interposed, still, after seeing the evidence which has been introduced into this cause, the Court cannot but think, that some parts of it, which are denied, might yet furnish grounds of prudent deliberation.

The next charge is that of collusion: On this one witness says only that a lady, whom she does not know, came with such a proposal from Mr. Chambers. But it does not appear, that she was authorized by him, nor that she did so in the witness's presence. It would be necessary that this person herself should be produced. There is then men-

tion of an offer by his brother; but there is no proof that he was authorized by him;—it is scarcely natural that it should be so. If made in consequence of the one made by her, it was an insulting proposal; but yet with this difference, that hers must be considered as an offer to withdraw a defence, which she maintained to be true, his only to take off the effect of what he declares to be false, and in which the Court agrees. It does not appear to have been acted upon. I do not say, that this indiscretion may not be visited upon him in some other place, but I think, it cannot properly have the effect of barring him from his prayer in this Court.

The third ground is, that of adultery committed by him. One proof to this charge is the evidence of one of the sisters, who speaks of declarations made by him, in letters to his wife, confessing his fault, and soliciting forgiveness;—which fault, if committed, was forgiven, and the letter was burnt. It is to be observed however, that Hannah Rigby, who was the object of his supposed attachment, positively denies the fact. The second proof to this charge is one, which conveys an imputation so distressing to the feelings of the family, that I shall pass it over, observing only on the result of the evidence, which I have carefully examined, that it by no means proves the fact alleged against him.

A remaining charge is that of cruelty, which is introduced rather incidentally, and was argued only on the supposition of the proofs of her innocence. But the Court holds her not innocent. On this plea the question might arise, whether a party would be entitled to bar her husband from his remedy of divorce for adultery, proved against her, by the plea of cruelty? I am inclined to think, that she would not. It is certain, that the wife has a right to say, "You shall not have a sentence against me for adultery, if you are guilty of the same offence yourself." The received doctrine of compensation would have that effect, because both parties are *in eodem delicto*; but this is not so in recrimination of cruelty: The *delictum* is not of the same kind. If the wife was the *prior petens* in a suit of cruelty, I do not know, that she would be barred by a recrimination of that species; for the consideration would be very different: The Court might not oblige her to cohabitation, which would be dangerous. Here the husband is the *prior petens* in a suit of adultery, and I take the general doctrine to be, "that a wife cannot plead cruelty as a bar to divorce, for her violation of the marriage-bed."

It is then less necessary to canvass the evidence on this point very minutely. I do not think, that all vehemence was on his side only. Many witnesses disclaim all knowledge of any such misbehaviour, except from her own representation. It is not to be denied, that he was an irritable husband; that there was much of violence and intemperate passion in his conduct, words, and attitude of menace, which might produce present intimidation, and which can be excused only by the madness of intoxication. If the Court was sitting to judge of mere propriety of behaviour, it might see much to censure, though it is not unreasonable to suppose, that much of this may be attributed to the effect of extreme jealousy. He makes many efforts to detain her in his society by humiliation on his part. Mr. Montagu says, that he assisted in soliciting her to return, which shews that he had no notion of danger to her: There is nothing else but his return from abroad without notice; and which this Court cannot consider as cruelty. There is no notice

taken of such a charge, but in answer to a suit brought against her for adultery. I do not say that the facts are so antiquated, that they might not be deserving of attention, if the suit had been brought against her for restitution of conjugal rights; but, I think, they can have no place as a bar to a suit for adultery, which is fully and satisfactorily proved against her. I feel myself bound, therefore, to pronounce, that Mr. Chambers has proved adultery against her, and that nothing is proved against him, which should have the effect of barring him from the usual sentence of separation.

HOLDEN v. HOLDEN.—p. 453.

Divorce, by reason of cruelty of the husband, sustained on the facts.

THIS was a suit of separation and divorce by reason of cruelty, brought by the wife.

JUDGMENT.

SIR WILLIAM SCOTT.

This is a suit for separation by reason of cruelty, on the part of Mrs. Holden. The marriage appears to have taken place in 1790; and it is alleged, that, after a cohabitation of eighteen years, she is under the necessity of praying the relief of this Court for protection, as it is unsafe to continue any longer in the society of her husband.

7.4 a 2. The libel is very diffuse in the matter set forth to sustain this prayer; and many facts, which are there introduced, have been abandoned on proof, as is not uncommon in suits of this nature, from want of evidence, owing to the private nature of such injuries, or the inflamed state of the feelings, in which these complaints are usually made. But the question is not, what is *unproved*, but what is *proved*, in the depositions, which I now proceed to examine. I must observe, however, in the first place, that the examination of the witnesses appears to have been much *lumped*, and without sufficient distinction in particular parts, which lays the Court under great inconvenience in considering the weight and force of the evidence. And, on this intimation, the Court expects, that this mode of taking evidence will not be continued.

5 b. The husband has given no plea, and has not even administered interrogatories, to which he might have required the answers of the complainant, and have obliged her to speak to circumstances of secret aggression, if he has any such to allege in his defence. The case rests entirely on the evidence of the wife, and, amongst other witnesses, there are the two sisters of the wife, Miss Allicocke and Mrs. Mawer. The latter has not seen much, and states only, "that she was dissatisfied with the general conduct and behaviour of the husband." The other sister was frequently with them. She describes the husband "as a man of violent passion, with others as well as with the wife, on various occasions;" and speaks particularly to a scene which passed between them three or four years after the marriage, which excited great terror. On that occasion, she says, "she heard high words between them;" on which it is to be observed, that they might begin with the wife. But nothing of that kind is proved or alleged, and the husband has lost the benefit of that suggestion, by not pleading in his own defence, or calling for the

answer of his wife, as perhaps he might have done with effect; since it is observable, that some of the servants speak in a manner not wholly unfavourable to him.

The witness goes on to describe, what passed on that occasion, in the following terms: She says, on the fifth and sixth articles of the libel, "that she had gone to her own room about ten minutes on retiring for the night, before the parties, that she heard high words, and the voice of William Holden, speaking in a violent passion, and that the wife came and knocked violently at her door, and was much agitated, and said, that Mr. Holden was sitting in his shirt, with a pistol on each side, and desired her to go to him; that she did so, and found him as described; that he said he was writing to her father, and she at last prevailed on him to let her take the pistols away, and found that they were charged; that she retired again to her own room; that the husband came and took from her the child, who had usually slept with her, and said, his wife would sleep with her that night, but shortly after came again, and gave her the child, saying, the wife would catch cold if she slept in that room." It appears, also, that the wife had a peculiar dread of fire arms; so that the general character of this behaviour, if not legal cruelty, is yet such violence of temper, as is adapted to create great fears as to the probable consequences.

The next fact that is spoken to, is that pleaded on the seventh article of the libel, on which the same witness says, "that on the 2nd February 1808, having gone up stairs, leaving the parties and the child in the front dining-room, she soon afterwards heard the husband call out to her to take the child, which she did from him on the staircase, and, in a few minutes, heard her sister cry out for help; that she went down and found her sister lying on the floor, and her husband standing over her, having hold of her arms, as if he would break the same from off the shoulders, apparently in great agony, and screaming; and on her remonstrating, he said, if she attempted to interfere, he would put her out of the window; and that the next day her sister was much bruised, and was obliged to send for a surgeon, and could not put on her night gown for a week."

Mrs. Hancock speaks to the same effect as to the bruises. Now, whatever the origin or occasion of this quarrel may have been, there is nothing to show, that it proceeded from the wife; and there is enough to satisfy the Court, that very unlawful violence was used upon the wife, from which she has an undoubted right to be protected.

There is another instance in 1800, which, though it is insignificant in itself, does, I think, begin in an act of very "froward" behaviour on the part of the wife, and which lays the foundation for a suggestion, that all the violence was not on the side of Mr. Holden alone. Mrs. Turner says, the wife came to her house on the day mentioned, and said that her husband wished her to dine at home as he was going to have a friend,—but she thought there was no necessity for dining there, and wished to dine with the deponent, and did so, although deponent's husband was engaged to dine with Mr. Holden.—That at night she went home with Mrs. Holden, and on going into the house Mr. Holden was greatly displeased, and told her she might go from whence she came, and after some altercation she did return and sleep at her house that night."

It is pleaded also, that a separation took place, for a short time, in 1808; that the husband used urgent entreaties with her to return, promising her that he would not, by words or blows, ill treat his wife again.

These terms convey the admission of the fact, that he had given her blows; and it appears also sufficiently from another instance, to which I am going to advert, that this gentleman laboured under that infirmity of temper, which would not permit him to adhere to the promise which he had made. This instance of ill treatment happened in July 1808, and is spoken to by Mrs. Hancock, who says "that Mrs. Holden called on her, and showed her her arms, and said she would not return to cohabit with her husband." The sister confirms this account, and says, "that Mr. Holden came to her, and acknowledged that he was much shocked at the sight of his wife's arm, the morning after this had happened." There is also the evidence of Mr. Foster, the surgeon, on this part of the charge, who describes her arm at that time to have been very black, and of an alarming appearance, and that it continued so for six weeks. There have been also two servants examined, whose evidence is not very material.

On these facts, the Court has to decide, whether the conduct of the husband amounts to that *sævitia* which authorises a separation. On this point the Court has had frequent occasion to observe, that every thing is, in legal construction, *sævitia*, which tends to bodily harm, and, in that manner, renders cohabitation unsafe; whenever there is a tendency only to bodily mischief, it is a peril from which the wife must be protected; because it is unsafe for her to continue in the discharge of her conjugal duties; and to enforce that obligation upon her, might endanger her security, and perhaps her life. It is not necessary, in determining this point, to enquire from what motive such treatment proceeds.—It may be from "turbulent passion," or sometimes from causes which are not inconsistent with affection, and are indeed often connected with it, as the passion of "jealousy." If bitter waters are flowing, it is not necessary to inquire from what source they spring. If the passions of the husband are so much out of his own controul, as that it is inconsistent with the personal safety of the wife to continue in his society, it is immaterial from what provocation such violence originated.

Secondly, The law does not require that there should be many acts. The Court has expressed an indisposition to interfere on account of one slight act, particularly between persons who have been under long cohabitation; because, if only one such instance of ill-treatment, and that of a slight kind, occurs in many years, it may be hoped and presumed that it will not be repeated. But it is only on this supposition that the Court forbears to interpose its protection, even in the case of a single act; because, if one act should be of that description, which should induce the Court to think, that it is likely to occur again, and to occur with real suffering, there is no rule, that should restrain it from considering that to be fully sufficient, to authorize its interference. Here there are repeated acts, diffused over many years, which put the wife in danger, and expose her to great bodily harm. Thirdly, it is not necessary that the conduct of the wife should be entirely without blame. For the reason which would justify the imputation of blame to the wife, will not justify the ferocity of the husband.

On examining the facts of this case by these rules, I think the conclusion which the Court is bound to draw is, that, under the defects which may be left on the case by the absence of all defence, by plea or interrogatory on the part of the husband, the complaint must be considered to be substantiated. The facts are not numerous, nor without intermixture of affection on the part of the husband, and not without some

provocation on the part of the wife. Yet, I think, there is sufficient to entitle the wife to the protection of the law, and that the Court is bound to pronounce for the separation, as prayed in the libel.—Separation granted.

CROMPTON v. BUTLER.—p. 460.

Defamation, the testimony of two witnesses required, but not necessary that they should speak to the same fact.

SMITH v. WATKINS.—p. 467.

Defamation. Words amounting thereto in legal construction; direct terms not necessary.

BREITHWAITE v. HOLLINGSHEAD.—p. 470.

Tithes, how far a debt discharged by a certificate of bankruptcy.

FILEWOOD v. MARSH.—p. 478.

Subtraction of tithes.—Notice as to setting out small tithes, how far required.—Custom of the particular parish.

FILEWOOD v. KEMP.—p. 487.

Subtraction of tithes. Composition not proved. See particulars, as to tithes of crops sold, whether due from the vendor; also as to barley-rakings, mills, etc.

FILEWOOD v. KEMP.—p. 494.

Tithe of corn mills, by the *tenth toll-dish*, not sustained. The *net profit*, now held to be the rate of tithing.

BEAURAINÉ v. BEAURAINÉ.—p. 498.

Appointment of the father of a minor, as *curator ad litem*, on election of the minor, but without the consent of the father, in order to substantiate proceedings against the son in a suit of cruelty and adultery, *not sustained*. H. 254

THIS was a question on the power of the Court to compel a father to appear as *curator ad litem* of his son, being a minor, who was cited to answer to his wife, in a suit of divorce, by reason of cruelty and adultery.

JUDGMENT.

SIR WILLIAM SCOTT.

This is a proceeding for divorce against a minor; and it is laid down in our books of practice, Oughton, tit. 20, that a minor cannot appear in person, but must appear by his guardian or *curator ad litem*, lawfully assigned.

If a minor has no guardian or *curator ad litem*, and none can be assigned for the purpose of substantiating proceedings against him; it must amount to a total denial of justice towards the other party, who complains of his conduct, and who is, in this case, his wife, complaining of brutal and barbarous treatment, and praying the protection of the Court to be given to her, by a sentence releasing her from the necessity of cohabitation. Though he has no guardian, he has a father who is his natural guardian by the law of the land, who can bring actions on his behalf for injuries done to him, and is bound to maintain his child,—who may bring in this Court suits, on his behalf, against the wife, of exactly the same nature with that which is now brought against his son. The minor has elected him his *curator ad litem*, and the father has refused, upon repeated applications, to accept the office, though offered to be protected from any expense, that might be incurred in the discharge of a paternal duty corresponding to the paternal privileges he enjoys;—and the son alleges, that there is no other person who will accept the office. In this state of things, unless he can be assigned *curator*, this consequence must follow, that minority shall protect a man in the most outrageous treatment of his wife. His marriage, as a minor, does not take him out of his minority, nor out of the incapacities of suing, or being sued, that belong to that state of minority. I have a right to suppose this to be a case of extreme oppression, that cries loudly for relief; and if this Court cannot appoint the natural guardian to be the *curator ad litem*, this most dreadful of all doctrines inevitably follows, that the unfortunate woman, who marries a minor, is doomed to continue under the most intolerable tyranny that can be exercised over a wife. Minority is to give total impunity. Other Courts exercise a power of nominating officers of their own, or other proper persons, to be guardians for this purpose. But this Court neither has nor claims such power, and unless it can compel the natural guardian to perform his personal duty, there is a complete defeasance of all remedial justice.

Under this necessity, and to prevent that failure, I shall hold the father to be *curator ad litem*, and enforce the process for that purpose. It may be a new case; because fathers have been willing to stand forward in aid of justice, and in vindication of their sons. But it appears to be a case, for which an urgent necessity calls upon the Court to provide, in the best manner that it can; and, I trust, that I do not exceed the limits of my duty, when I adopt the course which I propose: But if it should appear otherwise, I trust it will be pointed out in what better mode this Court could, more regularly, as well as more effectually, have reached the justice of such a case.

The Court assigned the father accordingly to give an appearance, as guardian to his son, by the next Court day. The order not being complied with, on the 7th of December 1808, the Court, on the prayer of

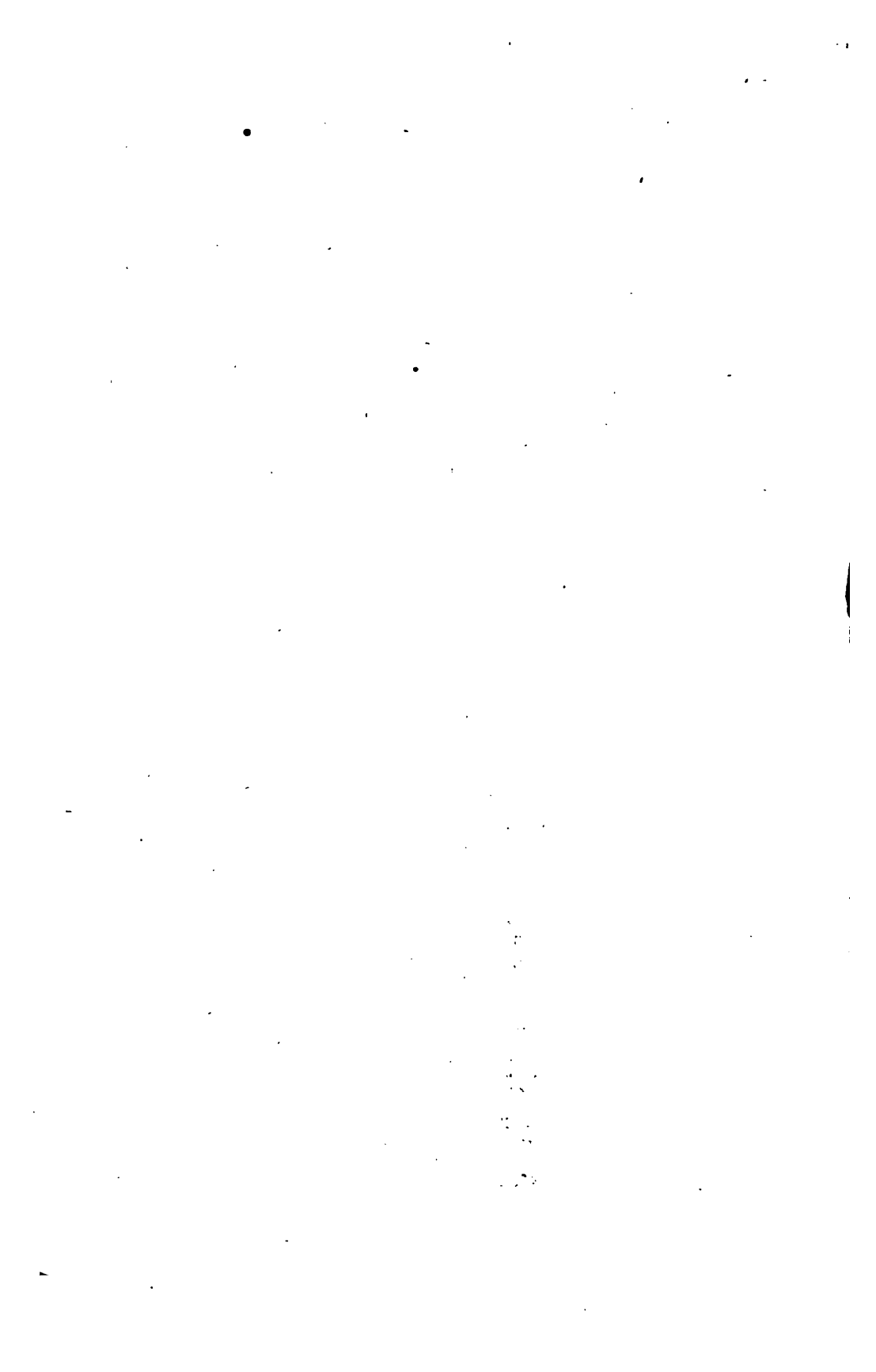
the wife, pronounced the father contumacious, and signed the schedule of excommunication.

From that sentence, an appeal was prosecuted to the Court of Arches, which *affirmed* that decree; and on 7th December 1809, another schedule of excommunication was porrected and signed, when the party was accordingly excommunicated. In the meantime application was made to the Court of Chancery for a writ of *assoiler* and *deliverance* to the Bishop, to absolve him. That writ was decreed on 12th February 1810, 16th Ves. jun. 347, and on 9th April the party was absolved.(a)

(a) The use of excommunication was discontinued sub modo by statute 53 G. 3. c. 127.

LAGDEN v. ROBINSON and GREEN.—p. 501.

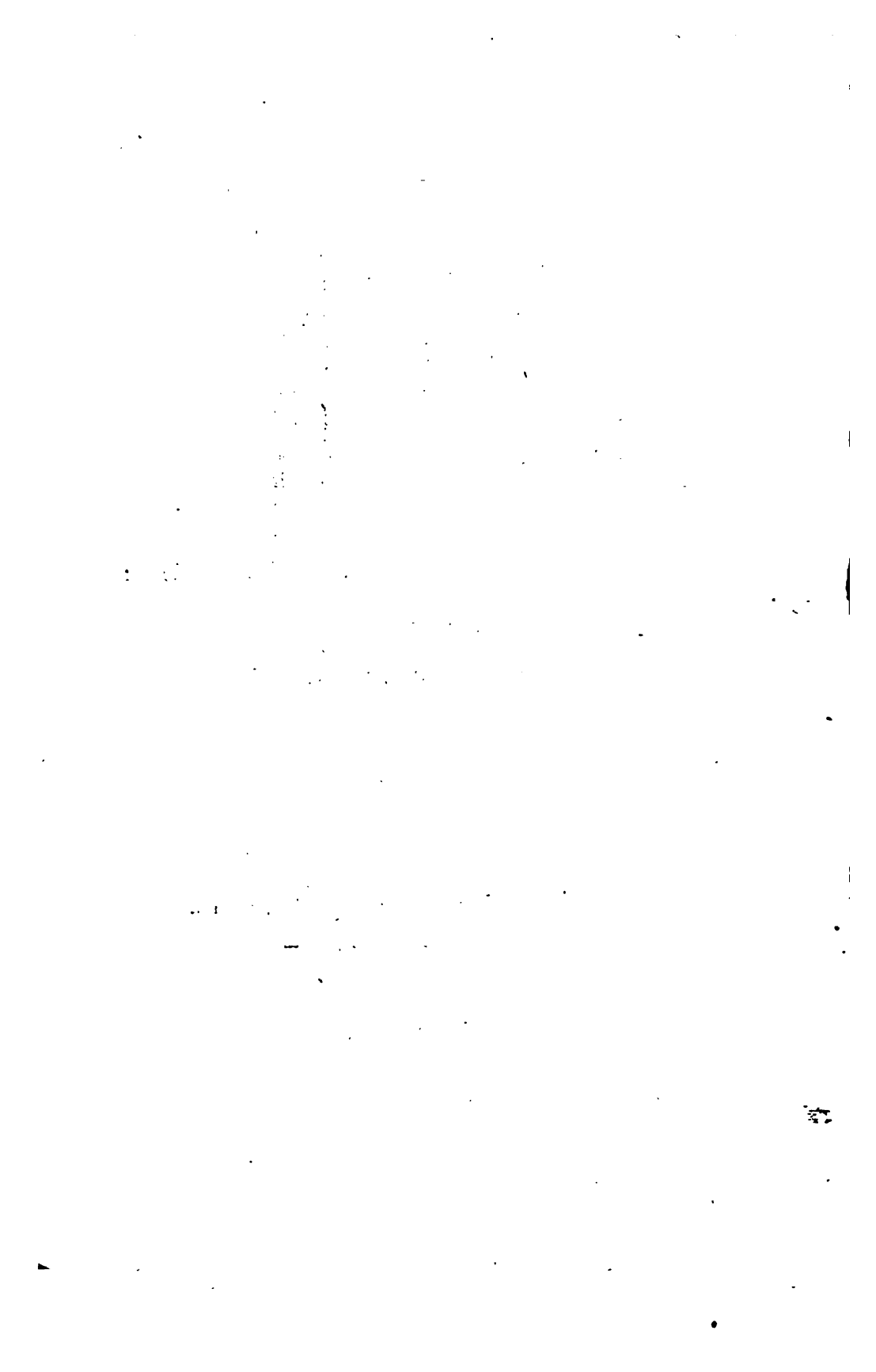
Subtraction of tithes: Endowment of the vicarage, though not in simple and positive terms, held sufficient. Matters of deduction and account, &c.



REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
CONSISTORY COURT OF LONDON;
CONTAINING THE
JUDGMENTS
OF
THE RIGHT HONOURABLE SIR WILLIAM SCOTT.

By JOHN HAGGARD, LL.D. ADVOCATE.

VOL. II



4

CASES

DETERMINED IN

THE CONSISTORY COURT

OF

LONDON, &c. "*Sounding Case.*"
Bull. on H. & D. 5423.2.6.

LOVEDEN v. LOVEDEN.—p. 1.

Principles of evidence in cases of divorce by reason of adultery, &c.

H. x This was a case of divorce by reason of adultery of the wife, in which the principles and rules of circumstantial evidence, in such cases, were much discussed to the effect appearing in the Judgment.

JUDGMENT.

Sir WILLIAM SCOTT.

This is a proceeding by Edward Loveden Loveden Esq. against Ann his wife, praying for separation, by reason of adultery. Nothing arises upon the proceedings: they have been conducted, as far as they go, in the usual manner. The articles, which are many in number, plead a marriage to have taken place on the 15th of November 1794. This marriage is admitted, and is likewise fully proved by many witnesses. Cohabitation continued between the parties till the 15th of March 1809, when, upon the discovery of an adulterous intercourse, as alleged, with Mr. Raymond Barker, son of a neighbouring gentleman in the country, and who is described as a lay-fellow of Merton College in Oxford, she was ordered to withdraw from her husband's house, and the cohabitation has never been renewed. She has offered no plea of any kind, but rests her defence, so far as it is preferred by her counsel, on the insufficiency of his proofs, and upon the answers to the interrogatories which she has addressed to several of his witnesses. These witnesses are twenty in number, including the person who formally proves the public documents relative to the licence and marriage; and they are stated to be supported by letters written and sent by herself to Mr. Barker, but intercepted by a servant, and communicated to Mr. Loveden by the agency of that servant.

115 x It is not necessary for me to "state much at large the rules of evidence which this Court holds upon subjects of this nature, or the principles upon which those rules are constructed:—they are principles so consonant to reason and to the exigencies of justices, and so often called for by the cases which occur in these Courts, that it is on all accounts sufficient to advert to them briefly. It is a fundamental rule, that it is not necessary to prove the direct fact of adultery; because, if it were other-

23.4.6
45.5.1

53.

wise, there is not one case in a hundred in which that proof would be attainable: it is very rarely indeed that the parties are surprised in the direct fact of adultery. In every case almost the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion; and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights. What are the circumstances which lead to such a conclusion cannot be laid down universally, though many of them, of a more obvious nature and of more frequent occurrence, are to be found in the ancient books: at the same time it is impossible to indicate them universally; because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances apparently slight and delicate in themselves, but which may have most important bearings in decisions upon the particular case. The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion; for it is not to lead a harsh and intemperate judgment, moving upon appearances that are equally capable of two interpretations,—neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man. The facts are not of a technical nature; they are facts determinable upon common grounds of reason; and courts of justice would wander very much from their proper office of giving protection to the rights of mankind, if they let themselves loose to subtleties, and remote and artificial reasonings upon such subjects. Upon such subjects the rational and the legal interpretation must be the same.

It is the consequence of this rule, that it is not necessary to prove a fact of adultery in time and place. Circumstances need not be so specially proved, as to produce the conclusion that the fact of adultery was committed at that particular hour or in that particular room; general cohabitation has been deemed enough. Parties living for months and for years together, and hoping by that means to insult the feelings of a husband, and to elude the justice of the tribunals which have to decide upon such matters, have by such contrivances supposed that they were sufficiently protected; but the courts of justice have held that that is an evasion which was perfectly insufficient for such a purpose, and the parties have been concluded by general cohabitation. This has been laid down repeatedly, and acted upon in this Court, in cases such as *Cadogan v. Cadogan*, (a) *Rutton v. Rutton*: and other cases have been con-

(a) In the case of *Lord Cadogan v. Lady Cadogan*,—The Court, after a full and particular examination of the effect of the evidence on the libel,* and the responsive allegation, observed—My opinion is so completely founded on the view of these facts, that it might not be necessary to go further: the sequel, however, calls for some observations from the Court. Lord Cadogan pleads “that the parties retired together into Wales, where they lived in domestic intimacy.” In the responsive allegation it is pleaded “that they did not go by agreement; but that they met there accidentally;” though it admits that they continued in that part of the country together. The improbability of this story is so strong, that even Ball, the servant maid, revolts at it, and takes it for granted, that Mr. Cooper went there, in consequence of knowing that Lady Cadogan was living at that place. Something has been said in defence of such a measure, as natural to persons in their situation; that, being outcasts of society, they might shut out the world, and all scandal together. Lady Cadogan, in this suit, stands highly on her honour, and desires her friends and the public to suspend their judgment till the cause shall be de-

* It is to be regretted that no sufficient notes have been preserved of this long and elaborate judgment, as it is recollected to have been.

firmed by the Court of Delegates, and is the established principle of this Court. Such are the general rules and such the general principles established here; and it is with reference to those general rules the present case must be examined. It is possible that the case may not require the application of the more extended rules, because it is possible that there may be such direct proof of the fact of adultery as not to stand in need of such an application.

Of the manner in which these parties lived together before about the year 1803, I think there is no evidence adduced which shows the state of the parties one way or other; excepting that it appears, indeed, that down to the very time of this alleged discovery nothing had arisen which had awakened suspicions in the mind of the husband. It is, I think, spoken to by Calcutt, who had been housekeeper in the family for some time, that in the year 1803 a connexion which had subsisted between the family of Mr. Loveden and the family of a neighbouring gentleman, Mr. Barker, who lived at Fairford in Gloucestershire, had produced something that attracted the attention of this witness in particular. Mr. Barker's family had lived upon a footing of great intimacy and friendship with the family of Mr. Loveden, which appears, in the later periods of it, to have been disturbed and interrupted in consequence

cided; and the Court is not to suppose that she was so deserted, as to be under the necessity of finding an asylum only in the society of the very person, who was the cause of the imputation which had been cast upon her. They do in fact however retire, and pursue their journey together to several places, in all of which the Court is desired to believe, that all which passed was innocent, because nothing had been exposed, contrary to common decency, to the waiters and servants of the places where they have resided.

It is true that Mr. Cooper sleeps at the inn: but is, in all other respects, domesticated in Lady Cadogan's house. He is there in the morning, and 'till night; his clothes are at the house, his horse also—he takes his meals there—every thing is there—he himself is constantly there, except for a few hours of the night. It is then from these few hours, and from the evidence of witnesses selected by themselves, that the Court is required to suppose, that all this intercourse was perfectly innocent. Abstracted from all the former facts, this might almost be considered as composing a separate and detached case. Here is the wife of another husband, and the husband of another wife, quitting all public and domestic duties in their own stations, retiring together and shutting out all witnesses, except persons chosen by themselves. Can it be necessary that the Court should require any other evidence than this, in the nature of facts of indecent behaviour? Is it for the interest of society that such a principle should be maintained? Mere cohabitation in this way, must, in itself, be held sufficient to found the judgment of the Court conclusively against them. In the case of *Rutton v. Rutton*,* there was a defence of the same kind: and though the gentleman slept in the house, it was proved that he had a separate room, and the witnesses, to that part of the case, declared that they had never observed any indecent familiarities between them. But in the Court of Delegates it was strongly held "that general cohabitation excluded the necessity of proof of particular facts." It may be possible that persons, of peculiar and eccentric dispositions or habits, may live together, in such manner, without actual criminal connexion; and it is physically possible, that persons may be in the same bed together without criminal intercourse. Courts of justice, however, cannot proceed on such ground: finding persons in such a situation as presumes guilt generally, they must presume it in all cases attended with these circumstances. They cannot adopt the extravagant professions of Platonism for the principles of their decisions. Such would be the decision of the Court on this point alone; but the Court is not at liberty to put out of its recollection all the antecedent facts of the case, on which it has before observed. Looking to them and to the main fact—the admission of a gentleman to her bedchamber at night, under the frivolous plea of illness, that has been set up, and to all the other particulars, which have been established in evidence, I feel myself compelled to pronounce, that the case is fully proved, and that Lord Cadogan is entitled to the relief which he prays.

* *Arches*, 26th January 1796. *Deleg.* 14th Nov. 1796.

of the transactions between this gentleman, who was a son of that family, and Mrs. Loveden;—for though it never did reach the eyes nor the ears of Mr. Loveden himself, it is alluded to in a conversation which passed between Mr. Barker and the butler, Hastings, who is a capital agent in these transactions;—it is alluded to that it had been known, and with feelings of great uneasiness, at his family house at Fairford: and that it was calculated to produce uneasiness there, cannot be denied; because he had been received with great hospitality in this house,—with great familiarity: and it is most fully admitted by the counsel on the part of Mrs. Loveden, that that which had occurred certainly was not that which such treatment ought to have produced. It is admitted by them, and could not be denied, without flying in the face of that mass of evidence which now lies before me, that a most improper attachment had taken place between these parties, and that acts extremely indelicate had passed between them; for they raise the question no higher than this, Was this attachment accompanied by adultery? Were these acts, indelicate as we must admit them to be, attended with the crime of adultery?

These admissions, which as I say could not be avoided without encountering the whole of the affirmative evidence which is here produced, will relieve me from the necessity of entering very minutely into the particular circumstances vouched by a great variety of witnesses. They certainly do prove a state of intimacy between these parties suspicious in the highest degree. The parties were observed to be fond of walking together separately from the rest of the family, arm-in-arm together;—that she paid particular attention to his accommodation when he came to the house,—was peculiarly attentive to the preparations of his room,—to the ornaments of his room,—even occasionally assisting to make up the fire in his room;—that she addressed herself with particular attention to him at dinner and meals;—that he came evidently by appointment, and when the husband was absent from Buscot, the place of his residence, or particularly engaged; that this attracted the notice of these witnesses, and convinced them that his visits must have been by appointment; because no sooner was the back of Mr. Loveden turned, than this gentleman appeared:—that while he was there, and the husband was absent, she was ordered to be denied to all other persons who came there, and was actually so denied;—that if Mr. Loveden's return was announced by the ringing of the house bell, they separated immediately, and met again in Mr. Loveden's presence as if for the first time,—as if they had not been in company and held any conversation before;—that they were fond, when walking in company, of separating from the rest of the company, walking together separately, and in the attitudes described;—that they were often seen retiring into the shrubberies and plantations in the garden;—that he came very frequently on horseback, coming with his horse into these plantations and shrubberies unknown till observed by servants; and never going up to the house, but meeting this lady at these places;—that they have been seen in the gardens with arms round each other's waist;—that they were seen upon one particular occasion to kiss each other; that upon finding themselves observed, they retired in great confusion; that at table they were in the habit of sitting close together, and, as the butler positively swears to his own observation of the fact, with their legs and feet fixed together under the table;—that in London they met, and evidently upon signals

and by appointment, to ride together in the Park;—that he has been seen to lay his hand upon her hip, and, upon being observed, to withdraw it in confusion; that at another time he laid his hand in a most familiar manner upon her shoulder;—that he was admitted alone into her dressing-room, where other gentlemen were scarcely ever admitted; and that he was so admitted totally unknown to Mr. Loveden;—that when parties went out coursing or hunting, these two persons always came home an hour before the rest of the company, and remained alone together:—in short, that a degree of familiar intercourse took place which attracted the notice of every servant and of every visitor in the house.

These are facts spoken to by such a number of witnesses, that I must repeat great part of these depositions which have been read, and which have been commented upon much at length, if I were to refer to them: I must state them entirely over again if I were to enumerate the particular facts spoken to in the depositions which these several witnesses have given; for all the servants, in various capacities which gave them opportunities of observation, concur in describing the intercourse as suspicious, and as gross in a very high degree.

It has been made matter of objection, among the few objections which it was possible for the ingenuity of advocates to collect upon this occasion, that this lady seems to have been living amongst spies, and that they seem all to have acted with unfavourably conceived impressions. The fact is, that their observations were awakened, and could not be otherwise than awakened, by the appearances which were presented to their view: Such scenes as these going on in a decent and respectable family, and some of them passing under the eyes of such a number of persons, could not but excite observation, could not but provoke conversation among them. If the evidence had been otherwise, I think it would have furnished a just ground of imputation; for such circumstances, as are described by the witnesses, could not pass without producing such consequences and conversation among them: they must provoke the indignation of the servants; they must have alarmed their vigilance, and have engaged them in what we find them to be engaged in,—the common purpose of defeating and detecting an intercourse so disgraceful to the house and so injurious to their master. The only wonder in the case, I think, is, that such an intercourse could have been possible for such a length of time, without in some way or other, by some accident, by some information, reaching the notice of Mr. Loveden. It had certainly attracted the notice of his visitors;—so says Mr. Seymour, who was a visitor in the house, and who states that he had himself observed so much, and had heard so much from other persons who had seen the same, that he found himself compelled by the duties of friendship to expostulate with her upon the intercourse, which he did not at that time suspect to be criminal, but which was at least suspicious, between her and Mr. Barker. She took it ill, and declared that so long as Mr. Barker behaved well to her she should not alter her behaviour to him;—a pretty strong proof of a blind attachment to this gentleman; because a woman of delicacy who had been informed by a friend that her character was suffering, in the opinion of respectable persons, on account of the footing on which she was with another gentleman, would at least, for the protection of her good name if not of her

innocence, have avoided appearances that had led to such unfavourable impressions of her character.

Mr. Pryse, who is the son of Mr. Loveden by a former wife, says, that he had observed attentions, though not with the suspicions which must have been excited if he had seen more. It appears by the conversation to which I have already alluded of the butler, Hastings, with Mr. Barker, to have found its way into the general talk of the country. With all this, however, nothing appears to have attracted the notice of Mr. Loveden. That occurred in this case, though certainly in an uncommon degree, which happens in many others,—that the husband is the last person who entertains a suspicion of his misfortunes. There is, I think, no reason whatever to presume any kind of connivance on his part, or any other forbearance than what arose from the most profound ignorance of the dishonour that was practising upon him.

There are several particular instances of the familiarities passing between these persons, which, I think it may not be improper for me more particularly to advert to; and, amongst the rest, some that are spoken to by Hooper and by Chamberlain: by Hooper upon the fifth article, and by Chamberlain upon the same day. Chamberlain says, “That on a Sunday morning, happening some time about a year and a half and within two years last past, Mr. Barker having either slept at Buscot House on the preceding night, or having called there on the Sunday morning, and the family being preparing to go to Church, and the carriage having gone for that purpose, and being about to come round to the door, he having Mr. Barker’s horse in the stable, came to the under-butler, who was then in the pantry at the bottom of the stairs, and near to the billiard-room, and asked if Mr. Barker had ordered or if he wanted his horse; and to the best of his recollection Hooper replied, that Mr. Barker was gone into the green house, and that if the deponent would stop a little he would show him some of Mrs. Loveden’s tricks: and the bell of the room in which the family had breakfasted having just then rung, the said James Hooper desired the deponent to go into the butler’s bed-room, and watch from the window thereof, which commands a view of the conservatory or green-house, whether Mr. Barker came out of the said green-house or not; and that Hooper then went to answer the bell, and the deponent watched as directed from the butler’s bed-room window; and that shortly afterwards he saw the family go to Church, but Mrs. Loveden having a pain in her face staid at home, and did not go that day: that as soon as their family were gone to Church, Hooper came into the butler’s bed-room to the deponent, and told him to listen and he would soon hear Mrs. Loveden come down stairs, and go through the billiard-room into the green-house; that he continuing to listen as desired, he plainly heard Mrs. Loveden come down the stairs and go into the billiard-room; she went through the communication as before described in the conservatory;—that Hooper afterwards came and told the deponent he had been through the billiard-room and Mrs. Loveden’s dressing-room, and into the small further room, and that she was not in either of the said rooms, and must have gone into the green-house; that being then quite certain that Mrs. Loveden and Mr. Barker were together in the said green-house, and having occasion to be about some part of the business in the house, he desired the deponent to keep on the watch from the butler’s bed-room window, in order to see whether they came out of the said green-house or not; that the deponent

accordingly did watch until the family returned from Church; that Hooper occasionally came into the said bed-room to him; but neither Mrs. Loveden nor Mr. Barker were seen till Mr. Loveden's carriage drove up to the front door on the return of the family from Church, which could plainly be heard by them in the green-house; and immediately after this, upon the hearing of the noise of the carriage coming up, the deponent saw the said Mr. Barker come out of the green-house by one of the windows thereof, and go round by the back of the green-house, and pass the north front of the house, and go towards the stables; that he directly afterwards saw Mrs. Loveden come out of the green-house through one of the sash windows thereof near to the house, and go and meet her mother; and he heard her mother blame her for being out, and say she would have more pain in her face or to that effect. That he immediately came out of the butler's bed-room, where he had remained at the time, and ran down to the stables, and overtook Mr. Barker going to the stables, and brought out his horse to him, and he rode away in the direction for Oxford."

Now to be sure this is evidence which shows an advantage was taken of the retirement of the family for the purpose of going to church. This is fully confirmed by Hooper, as far as he had an opportunity of observing: he did not wait along with Chamberlain, because his business called him into the house; but, as far as he goes, he fully established the fact,—that in the green-house they were together from the time that the family went till the time that the family returned, and that they then separated in such a manner—for that is a circumstance not to be laid out of consideration in all these cases)—that they then separated in such a manner as to elude the appearance of their having been at all together, thereby giving to this meeting an appearance of secrecy and clandestinity which leads to a suspicion of every thing improper.

There is another thing spoken to by Hooper at a succeeding time, and it is this.—He says, "That in the month of January 1808, when Mr. Barker was on a visit at Buscot Park, and all the company then at the house had gone out to take the diversion of coursing, and amongst them Mrs. Loveden and Mr. Barker, these two, as they usually did on such occasions,"—a fact which is spoken to by other witnesses,—“came home about an hour before the rest of the company and more: and after they had been in the house a short time, there having been a dish of fine fish caught, and the cook wishing to know how Mrs. Loveden would choose to have them dressed, he the deponent took them on the dish in order to show them to his mistress, and to take her orders as to the dressing the same; that for that purpose he went into the library and breakfast-parlour, then up to Mrs. Loveden's own bed-room; and having knocked at the door thereof, which was ajar, and no person answering, he went into the same, and from thence into the little dressing-room adjoining, which was used by Mrs. Loveden, and also in the adjoining room, called Mrs. Loveden's dressing-room, and into every other bed-room on that floor, except one room,”—that he particularly describes,—“and he could not find her in any of the said rooms, nor did he see Mr. Barker: that upon his return down stairs he met Miss Loveden on the hall floor, nearly opposite the library door, of whom he inquired if she knew where Mrs. Loveden was; to which she answered she did not, but supposed she was in the room called the dressing-room, or to that effect. He told her he had been there, but that she

was not in the said room: that immediately afterwards she came out of the dining-room into the hall to the deponent, and appeared very red in the face and extremely confused, and held her riding-habit half way up her legs, as if she did not know what she did from the confusion she was in; and that having given the deponent orders as to the manner she would have the fish dressed, she then went into the library to Miss Loveden, and the deponent carried the fish down stairs: that he immediately came out again to the side of the stairs and listened, and that he heard a man's footsteps come out of the said dining-room, which Mrs. Loveden had just before left, and run up stairs." The fact then is, that the parties came home an hour before any of the rest of the family, that they were not to be found, and that this servant who went to speak to his mistress came to the dining-room door; that she met him, so as to prevent his entering the door, in a state of confusion, and that a man was there; and as Mr. Barker could not possibly be any where else, I think it leads to the unavoidable conclusion that he was the person who was there.

There is another fact which is mentioned, that is of the same nature, and which leads to conclusions of the same kind. He says, "it was not a custom with him, as business did not call him, to walk in the gardens, pleasure grounds, or plantations at Buscot; so that he had but little opportunity of seeing them; but he knew that they were in the habit of walking together about the said grounds, plantations and gardens; for he has himself seen them go into the plantations and about the greenhouse garden, and has at such times frequently seen them walk together arm-in-arm within view of the house. That one afternoon in the year 1805, when a Mrs. Stephens of Bath was on a visit at Buscot Park, the deponent, and William Musson, a servant to a gentleman who was there likewise on a visit, having been walking out in the Park, and coming into the plantations, they saw two persons at a little distance approaching that part of the plantation where they then were: upon which the deponent and this other servant who was with him, not knowing who they were, stopped in the thick part of the plantation among the shrubs till they passed them; and as the said two persons approached, the deponent and this other servant plainly saw Mrs. Loveden and Mr. Barker walking together, having his arm round her waist, and Mrs. Loveden having her arm round his waist; and he and his companion remained concealed in the plantation until they had passed by: then they came out of the plantation, and went towards the house; and when they had got into the park again to go to the house, they met Mrs. Stephens, who inquired of the deponent if he had met Mrs. Loveden: and the deponent, not choosing to say he had met her with Mr. Barker, said he had not seen her; upon which Mrs. Stephens said she had lost her."—So that she had contrived to quit this lady and to join Mr. Barker, and to walk with him in the manner which these witnesses have described.

There is another witness to whose evidence I will advert, and that is M^r. Nicol. Something of an objection was taken to his evidence as a witness, from what appeared upon an interrogatory, that he had had a quarrel with Mr. Loveden, on account of his having bartered some fruit for some seeds.—I do not think that that can be admitted to affect the testimony of this witness in any degree: it is known that these things are on a different footing in different families; it is a confidence reposed

in gardeners in some families to make exchanges; and a man acting fairly and for the advantage of his master's concerns would not be in the least degree discredited by it: and if he supposed that his authority went further than it did, that cannot be considered as a circumstance at all invalidating his testimony as a witness—least of all would it give a favourable bias to his testimony towards the person who had so resented the liberty he had taken. He says, “He observed there was a great degree of intimacy between Mr. Barker and Mrs. Loveden, for they were in the habit of walking together and alone arm-in-arm in the flower-garden and pleasure-grounds at Buscot Park, on every occasion they could find so to do: that, from the manner in which they met at times in the plantations and in the garden, he had no doubt but that they met there by appointment:”—He says, “That he remarked that when Mr. Barker was visiting at Buscot, Mrs. Loveden used to get up in a morning much earlier than was her usual custom, and to come into the flower-garden, where she was always met by Mr. Barker, and that they used to walk there together and alone till Mr. Loveden's bell was rung; and whenever the deponent was in the garden at such times, and was near enough to hear the bell, he always observed that they separated, and Mrs. Loveden went into the house; for it was then known that Mr. Loveden had got up: and he has at times found them walking together in the plantations, when it was not known in the house that Mr. Barker had come there; and on one day in particular he well recollects.—” That goes to a fact which I shall have occasion to observe upon by and by.

There are other witnesses that speak to situations exactly of the same kind, and as situations frequently occurring between these parties. Now I do confess that, upon a view of this general evidence applying to the general conduct of these parties to each other, I am very much inclined to accede to the doctrine which has been stated by the counsel for Mr. Loveden, that it would justify the legal conclusion that adultery had been committed if any situations were shown in which the fact was at all likely to have passed. It would be, I think, a doctrine extremely dangerous to the security of domestic life, if all this could pass without warranting such a conclusion. What!—when an improper attachment is admitted to have existed between the parties—when it is admitted that indelicate acts have passed between the parties when they were within the reach of observation, shall it not be concluded that those acts were carried much further when they were out of the reach of observation? I am not ignorant what allowances are to be made for the laxity of modern manners; but does it in practice or in reason extend to liberties of the kind described, without subjecting the parties to unfavourable conclusions, if they are found in situations in which they are withdrawn from the eye of an observer? I think the law would lose sight of that justice by which it is to regulate the rights of individuals, if it were to hold that all this took place, and that nothing further passed when the parties were entirely unrestrained by the eyes of any persons whatever.

However, the matter does not rest here: the evidence goes a great deal further; and is such as, I think, to leave but little doubt upon the minds of those who have to consider its effect. I mean particularly here to allude to the clandestine correspondence which has been produced. The fact that any correspondence whatever, unknown to the

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husband, had passed between this lady and Mr. Barker, would of itself be highly suspicious; even if its nature and its tenor were wholly unknown, it would have been open to the most unfavourable conclusions regarding that nature and tenor. But how is it conducted? Why, it appears that in the country she was in the habit of putting letters directed to this gentleman privately into the bag,—letters not directed by her husband, though a member of parliament. It appears that she was in the habit of receiving letters not addressed to her husband, but separately to herself; that she was in the habit of receiving them with great eagerness; and, in the latter period of the history, that she was in the continued practice of getting the bag before it was produced to her husband or to any body else; that in town she herself put letters directed to this gentleman into the receiving offices, or delivered them herself to the postman with her own hand; some of these letters are sufficiently proved to have been directed to this gentleman. All these facts are established very fully by Stratton, by Chamberlain, by Hooper, by M^cNicol, and by Dyke.—Now under such circumstances as these, I think all conclusions must be unfavourable.

69. "The correspondence of a young married woman with a young man, unknown to her husband, is what I presume hardly comes within the known latitude of modern manners;" but, connected with the general footing on which these parties, by all the evidence to which I have alluded, were proved to have stood, it speaks a more decisive language with respect to its nature. But, however, it does happen in this case that letters have been intercepted, and are within the view of the court; the time and the manner of their being brought to light and their authenticity are fully proved. They were taken out of the bag;—and without entering into the particulars, there is very sufficient evidence that they were written on the 26th of November 1808; that they were put into the bag by her; that Hooper, having suspicions that there were letters passing from her to Mr. Barker in this bag, contrived to get these letters out of the bag; that he communicated those letters to some others of the servants, particularly to Haynes, with whom he appears upon a footing of intimacy, and that they were afterwards delivered up to Mr. Pryse, the son-in-law, upon the discovery which took place some time afterwards. I think their identity is clearly established by this witness, and by the other witness who has proved their contents, and by Mr. Pryse himself; and I see nothing which at all shocks probability in the idea of his having kept those letters by him so long. They are letters which it might puzzle such a man as this to determine how to produce till some opportunity offered; and he appears to have been unwilling to awaken the feelings of his master upon the subject: he waited for an opportunity of seeing Mr. Pryse, and then he took the opportunity of communicating them immediately.

The handwriting of the letters is proved, and they are proved to have been written upon a frank of Mr. Loveden's. The larger letter contains two inclosures; the larger letter is itself declaratory of violent and of mutual attachment; it concludes with desiring and hoping that they may affectionately love, that their attachment may be co-eternal, and that they may affectionately live and die adoring one another: it describes in terms of great lamentation the difficulty of access to the former rendezvous, for that the access and retreat were become too visible from felling the woods in the shrubbery: it relates her repairing to

different out-buildings in order to ascertain whether a meeting might be accomplished in them; but complains that the barn is locked, and that the other hovels are unfit for any one to enter: he is desired to devise a scheme to meet; and he is told that in the day-time there is no possibility of escaping detection, from the curiosity of servants and other prying persons; that she has a difficulty in inviting the danger of a night's attempt, but thinks that from the hall window there is no doubt of admitting him quietly for an hour or two.

In this letter there is one envelope dated in May 1804, and which, she says, will speak for itself; and that I suppose it might do to persons who understood the transactions to which it alludes; but to be sure there is nothing in that letter itself which does show how it comes to be there with that particular date affixed to it. The other is sealed up intelligence to explain to him what it is essential for him to know. To be sure that is a letter which speaks for itself, without reference to any external transactions. It is a letter which from public decency was not permitted to be read in this Court; but I feel that my public duty calls upon me to state so much as this—that it does contain an account of the times in which the periodical indisposition of the sex visits her, and when she says she must avoid intercourse: she promises to mark the period in future, so that he may always compute it without difficulty; and she desires him to consider this communication as most indulgent, as she certainly had a right to do, and most explicit.

This is a letter which I think requires no comment whatever. It is admitted that it does contain a declaration of violent attachment on the part of the writer; but it is said there is no proof of any adultery having been committed between them. I confess I cannot help considering such a letter in a very different light, and that it does connect itself with a direct acknowledgment of facts of adultery having passed between these parties. There are only three possible suppositions in which such a letter as this can be conceived to have dropped from the pen of the writer. One of those is, that it may have been written by a woman in a state of absolute insanity, with a mind disordered, and indulging itself with vicious images that have no connexion with any reality and fact:—that is a possible case undoubtedly. It is another possible case, that such a letter might be written by a woman with the malicious intent of defaming the character of a virtuous man, to whom such letter might appear to be addressed, but who had no such connexion whatever as those letters import: that is a possible case. But that either of these suppositions exist in the present case is out of all question; nobody imputes that this lady had any thing in the nature of lunacy; nobody imputes that she had any malicious design against the reputation of this gentleman, who was the object of her ardent attachment.

Then what is the only other supposition to which the Court can allude?—That it was written by a woman, and could be written by no other than by a woman, who had made a surrender of her body, her mind, and every thing which belonged to either the one or the other, to the person to whom this letter was addressed. Here is an act, and a proximate act it is undoubtedly, as connected with something which had passed between the parties before; because it is impossible to conceive that a woman would write such a letter as this, saving in one of the two possible cases which I have excluded from all consideration as applying to the present case. It is quite impossible to conceive that

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such a letter could be written by a woman who had not, in the most unreserved manner, submitted her person to him to whom it is written. It appears a matter of a stronger nature than that which we hold here to be a direct proof of adultery,—the having gone to a brothel with a person. The act of going to a house of ill-fame is characterized by our old saying, that people do not go there to say their paternoster; that it is impossible they can have gone there for any but improper purposes; and that is universally held a proof of adultery. But many persons would go to a brothel who could not bring themselves up to the writing a letter of this kind. It is a letter that proves, in the most striking and conclusive manner, not only that the parties must be contriving for future indulgences, but that there had been that sort of intercourse which alone could have produced such a familiarity, and which alone could have emboldened a woman to describe in terms which I do not repeat, that which certainly showed, beyond all question, the fact that these parties had been so connected together.

After such letters as these are proved, the proof of facts might appear superfluous; and I think it is super-abundant in this case. There are meetings, both prior and subsequent to the date of these letters, in which the commission of adulterous acts must be inferred. I do not say that from every one of these acts I would draw the same conclusions in the case of all individuals to whom no such history applied; but that is not the way in which evidence is to be considered. Other facts and other circumstances are explanatory of meetings which are doubtful in their own nature, and capable of candid interpretations:—they define appearances that might otherwise be ambiguous. These letters are a gloss or a running comment, I think, upon the text which occurs in the history of these parties: they are decisive of the terms upon which these parties met:—and that the writer of these letters could meet privately, and out of the reach of observation, the person to whom they are addressed, without any view to the purposes these letters express, is impossible to be conceived; and I think it is not less impossible that they should have met in the manner described, without his having concurred in effecting those purposes: for though these letters never reached Mr. Barker, I cannot but think that the probability highly is, that verbal communications were, in the opportunities which afterwards presented themselves, made upon this subject, agreeably, as she says, to his directions, and agreeably to her inclination to give the communication that was wanted.

The first fact that occurred to which I shall advert, is one that happened at Kingston House, and which is spoken to by Hastings, upon the 7th article. It appears that Mr. Loveden, who is a member of parliament, had left the country in the month of February 1807, and went to reside at a house at Knightsbridge called Kingston House, where he continued till about the 4th of July in that year, when the family returned to Buscot:—that Mr. Barker dined twice while Mr. Loveden was there:—that in the month of May, Mr. Loveden went down to Shaftsbury, on the occasion of the general election which took place at that time, and that Mr. Barker came twice to Kingston House during Mr. Loveden's absence:—that on the first of such visits Mr. Barker came with a gentleman, who remained for some time in a room in front of the house, and Mr. Barker and Mrs. Loveden remained alone together for about three quarters of an hour, without being seen by the witness;

'and that he then went away, and let himself out. It is said, cannot people go into decent rooms in a decent house without being suspected? Yes, certainly, if they are decent persons; but if such an intercourse is proved between them as is established by the fact of this correspondence, and by the other facts to which I have alluded,—I say the fact of such parties being close together for such a length of time, and unobserved, warrants the conclusion that they have committed the criminal act.

But, however, the next fact is of a stronger kind.—It appears that he then came alone: that Mrs. Stephens was with Mrs. Loveden at the time, and was sitting with her in the breakfast-parlour, in which she usually received other visitors: that Mr. Barker then rang the bell; and just as the deponent had let him in, and was going to announce him, and to show him up stairs, she came running down stairs, having seen him from the breakfast-room window, as the deponent supposes, met him in the hall, shook him by the hand, and took him into the green dining-room, which was a back room on the ground floor, with windows opening into and communicating with the garden by five steps; in which room there is an inner room, which had formerly been used as a bedroom, and which was a dark room, having no other than a borrowed light from a water-closet within; so that though the workmen might be employed in the garden at such time, Mrs. Loveden and Mr. Barker might have retired to such room, and been out of the sight of any persons; and after they had been together and alone in the green dining-room about an hour, and till the men employed in the garden had gone to their dinner, they then went into the garden and walked together there for about half an hour; and then Mr. Barker let himself out as before." I confess, after what has been proved of these parties, this fact, that she quitted the company in which she was—that she did not introduce Mr. Barker as a visitor where all other visitors were received—that she retired with him into a room communicating immediately with a dark room,—and that they there staid alone together in a situation that afforded such facilities; this does impress upon my mind a very strong conclusion that those facilities were not thrown away upon these parties.

+ The next fact to which I shall advert is that which is spoken to by 402. Major, upon the 9th article as having passed in the barouche: and what he says is this,—“She was much in the habit,” he states, “of going about in her carriage in the streets, and meeting Mr. Barker there; and that he does not remember ever to have seen Mr. Barker get into the said carriage when they have so met in the street, but once, and that was in very warm weather in the said year 1807:—that they met in Bond Street, where Mrs. Loveden was stopping in her carriage at a chemist's shop door; that he came up to the carriage and desired the deponent to open the same, which he accordingly did, and Mr. Barker then got into the carriage; and she desired to be driven to a house, a dress or cotton shop, about two doors beyond Temple Bar, on the right hand side of the way going from Bond Street; that they were driven there,—that she got out of her carriage, went into the shop for a few minutes and then returned to her carriage to Mr. Barker, and ordered the same to be driven to Hyde Park corner, where Mr. Barker got out of the carriage. That it had been customary for her to have her carriage, which was a barouche, open when she rode out, which she generally did in company with Miss Loveden; but that on this day, which was a very warm day,

it was kept close or shut up:—that when he, the deponent, got down from behind the carriage to open the door, to let Mrs. Loveden out at Temple Bar, he observed that the sun-blinds were all drawn down, and he observed the same when he got down to let Mr. Barker out of the carriage at Hyde Park corner; and he then observed that the said Mr. Barker seemed much confused,—looked about him very much,—desired the deponent to make haste: and Mrs. Loveden appeared much heated and very red, that her hair was more tumbled and disordered than ever he had before observed it. From which he concludes,”—a conclusion in which I am disposed to concur, from what I have seen of the nature of the intercourse which is proved to have subsisted between these parties,—“and he has not the least doubt,” he says, “and he in his conscience believes, that whilst they were in this carriage they had carnal use and knowledge of each other’s bodies.”

The next fact which I shall notice is that which occurs in the deposition of M’Nicol. He says,—“That one day, happening on a Sunday, in the summer of 1807, just after the family had returned from London to Buscot Park, Mrs. Loveden having remained at home whilst her husband and his daughter, and the mother of Mrs. Loveden, had gone to Church, he happening to observe that the windows of the green-house or conservatory, near the centre thereof, which he had himself opened in the morning to give air to the exotic plants, were shut, (it being then about one o’clock,) and likewise that the inside shutters to such windows, which were made to prevent the effects of the frost, and of inclement seasons injuring the plants, were also shut—to, he went in at one of the windows which fronts the west of the house, conceiving that some of the persons about the grounds had shut the same through mistake, and on his entering the said green-house he was very much surprised to find Mr. Barker and Mrs. Loveden standing close together between the plants and the back wall of the green-house, directly opposite the windows which were so as aforesaid shut up;—that on seeing the deponent enter, they stood close together quite still as if desirous of avoiding been seen, and the deponent then opened the shutters and windows and walked away through one of the windows of the said green-house, and went through the side door through the colonnade that communicates with the house, and immediately afterwards met Mr. Loveden’s carriage in the south front of the house coming from church; and having seen Mr. Loveden and his daughter and Mrs. Lintall go into the house, he was desirous of seeing which way Mr. Barker would make his escape from the house, as he had not a doubt he had been secretly and clandestinely with Mrs. Loveden that morning in the green-house; and for that purpose he went round the flower-garden, in order to see whether Mr. Barker would go out at the back door thereof, as he found he did not come out at the front door; and just when the deponent had got half way round to the back door he met Mr. Barker, and saw him pass the south front of the house in haste; and though it was a very warm day, he had a great coat on buttoned round him, and stooped to avoid being observed who it was;—that he looked after him to see whether he had a servant or a horse waiting for him, or whether he went towards the stable; but he passed the road leading to the stable.” He says again, “That he had not a doubt,”—and I confess it does not appear to me to be in the least degree an uncharitable conclusion,—“he had not a doubt, but does verily believe, that whilst Mr. Barker and

Mrs. Loveden were as aforesaid in the conservatory or green-house on the said Sunday forenoon, they then and there had the carnal use and knowledge of each other's bodies." It is said they were fond of plants; and she is proved particularly to have been very fond of dressing up his room with flowers, and very fond of going to nursery gardens: but I should think they would not go and shut up the windows and shutters of a green-house in order to speculate on plants; that is not the way in which their attention would be exercised; nor can I conceive, after such a circumstance, that that was the object which had brought these persons together in a situation like this.

The next witness to whom I am under the necessity of adverting is Mary Day, on the 5th article. The account spoken to by M^r Nicol passed in the year 1807, I think. The facts spoken to by this witness passed in the Christmas of that year; for it appears that Mr. Barker was in the habit of paying annual visits;—she describes Mrs. Loveden's general conduct in common with all the other witnesses; and it would really be nothing more than repetition of the depositions if I were to cite the evidence of all the witnesses that vouch the facts,—that they were fond of being together in the rooms of the house. She says, "Particularly she remembers that on one morning about nine o'clock, happening a few days after Mr. Barker had come on such visit, and just before Mrs. Loveden had gone down to breakfast, the deponent having gone up stairs to a closet she had on the same floor with the bed-rooms, and intending to go into such of the rooms as had been left by the persons who had slept therein, and among them intending to go to Mr. Barker's bed-room, to make his bed and put the room in order, if he had then left the same; she on going to his bed-room door found he had not left his room, but heard him talk to some person then in his bed-room with him, who the deponent then supposed was his own man-servant: but she immediately found her mistake in that respect; for the man was below, and came up to his room door with a trunk which had just come by the coach or some other conveyance; and making a noise by bringing the trunk up and putting it down at the door of his master's bed-room, she heard the door locked within, and the man-servant went away; and the deponent then well knew that the voice she heard was the voice of Mrs. Loveden: and from such circumstances she is certain that Mrs. Loveden was then in the said bed-room," that is to say, in the bed-room of this gentleman with the door locked. She says, that she considered this as highly improper; but she cannot take upon herself to say whether the act of adultery was committed. She adhered to the strict rule of evidence, that, unless she sees the fact, she will not take upon herself to warrant it.

She says, further, "That on this Christmas visit, Mrs. Loveden, and the company then in the house, having gone up stairs for the purpose of preparing or dressing for dinner, the deponent having gone up stairs on the bed-room floor to her aforesaid closet, between the rooms where Mr. and Mrs. Loveden slept and that where Mr. Barker then slept, it being then near dinner-time and getting quite dusk, but quite light enough to see any person in the passage leading to the bed-rooms, she being then in the closet, and having the door thereof a little open, was thereby enabled to see to the end of the passage, and particularly his bed-room door, without being herself seen therefrom, for she had no light with her; and she then observed Mr. Barker come out of his bed-room, which

was nearer the top of the stairs than Mrs. Loveden's was, and look all around as if to see if any person was within sight, and then look at the clock a little, and immediately afterwards saw him go down stairs, and a few minutes after the deponent heard a footstep come out of Mr. Barker's bed-room, and down the two steps which led therefrom, and along the passage past the closet where the deponent was; and she having the door open a little ajar, plainly saw that it was Mrs. Loveden who came out of the said Mr. Barker's bed-room, and saw her go into her own bed-room,—for she was obliged to pass the closet in going thereto,—and she clearly and distinctly saw it was her said mistress;—and her conduct was so extremely suspicious, that, upon this occasion, she admits that she cannot but believe that they had at such time been criminally connected together. She says, that upon several other occasions, she has known Mrs. Loveden and Mr. Barker to be alone together unknown to Mr. Loveden during Mr. Barker's visits at Buscot Park, particularly in a room on the bed-room floor, which was Mrs. Loveden's dressing-room, but was used as a sitting-room for ladies only, and was a room where Mrs. Loveden used to write in, and where gentlemen were not admitted."

Elizabeth Haynes, who was her own woman, speaks to particulars of a similar nature.—She observes that she was particular in dressing herself when this gentleman was expected, more than at other times:—in seeing that his bed-room was put in proper order, and his fire kept up, which she never troubled herself about with other gentlemen; and that from these and other circumstances she was led to suspect they did conceive a criminal passion for each other. Then she goes on to say, "that she had often reason to believe that Mrs. Loveden went in a secret manner into the bed-room of Mr. Barker while he was there, and remained alone with him for some time; for she remarked of late years their connexion became more unreserved, particularly while Mr. Barker was on a visit there at Christmas 1807, and for a fortnight or three weeks that Mrs. Loveden used frequently to go up stairs to dress before the usual time for the afternoon; and when she went out of her room to go down stairs, she would not allow the deponent to light her down, but said she would light herself to the top of the stairs, and would put the candle in the room at the top of such stairs, called her dressing-room, and that the deponent might afterwards fetch it away; that she then supposed that Mrs. Loveden used to go into Mr. Barker's room frequently whilst he was so there dressing; and she was confirmed in such her suspicions from the circumstance of having, on one of the afternoons when Mrs. Loveden had dressed for dinner rather earlier than usual, and had gone out of her bed-room for the ostensible purpose of going down stairs, heard Mr. Barker's bed-room door open, and just about the same time that Mrs. Loveden could have got there; and that after remaining in Mrs. Loveden's room about ten minutes, without hearing the said door open again, having then gone into a closet which was appropriated to the deponent's own use, and is in the bed-room passage opposite the housemaid's closet, from the door of which she could see the steps leading to the recess from which Mr. Barker's bed-room door opened, she very soon afterwards saw him come out of the said bed-room down the said steps in his dressing-gown, and walk to the clock directly opposite; and having first held the candle up to the clock, and looked at it, he then turned and looked both ways down the passage, as if to take a survey

whether any person was within view: seeing the deponent, he returned up the steps again, as if to go into his bed-room; that she then went out of the door leading from the bed-room passage to the back stairs, and went so far up the back stairs as to enable her to see through a partition light over the back stairs door into the passage; and after remaining there about five minutes, or not quite so much, she saw the said Mrs. Loveden come down the said steps leading from Mr. Barker's bed-room, without any light, and go down the best stairs; so that she is certain Mrs. Loveden had, at the time deposed to, been in Mr. Barker's bed-room whilst he remained therein, and that they were there alone together."

There is another fact she remembers: "That on another occasion, happening one afternoon whilst this visit took place, Mrs. Loveden having gone up stairs to dress for dinner, and Mr. Barker having gone into his room, she ordered her, Haynes, to wait a little, for that she had forgot something and must go down stairs, or to that effect; and she then took a light in her hand, and went out of her bed-room, and pulled her door to after her, and went along the passage, as if to go down stairs; but the deponent having immediately opened the door again, heard Mrs. Loveden go up the steps leading to Mr. Barker's bed-room, wherein he then was; and the deponent being curious to see her come out of Mr. Barker's room again, went up the aforesaid back stairs again, high enough to see the passage of the bed-room floor through the partition light before described; and in a quarter of an hour from the time Mrs. Loveden so went into the bed-room, she sees from the back stairs the said Mrs. Loveden come down the steps leading from Mr. Barker's room, with the candle and candlestick in her hand, but with the candle extinguished, and saw her go from thence into her own bed-room."

There is another fact of the like kind that she mentions: "That one morning during Mr. Barker's visit at Buscot, at this Christmas time, she was employed in her usual way, being at that time putting away some things in her aforesaid closet, and that she saw Mrs. Loveden in her riding-habit, which she frequently wore, coming down the steps from Mr. Barker's room, where he then was; and she, observing the deponent, turned back, and went into another room in the recess to which the steps led, and which was next to Mr. Barker's room, as if she had forgot something, by way of excuse, as it struck the deponent, for her coming down those steps;—that she opened a drawer in such room, and took out a port-folio with some papers therein, and gave it the deponent, desiring her to put it in another closet she had the care of; that she seemed very much confused, and that she very soon afterwards saw Mr. Barker come out of his bed-room and go down stairs; and she has not a doubt that they had been together and alone in his bed-room, and that they had again committed adultery together."

I should exhaust my own strength as well as the patience of those who hear me, if I were to go into an enumeration of all the facts, that are proved to have taken place, as between these two persons.—There are two or three of them which I am under the necessity of noticing, and those are the facts which occurred upon the 8th of August 1808, and which are spoken to by two or three witnesses, who in all material facts perfectly corroborate each other. There are some little differences, but which, in my opinion, give a support to evidence, and do not break in upon it. The witnesses, to whom I now refer, are Hastings, Calcutt

the house-keeper, who had lived long in Mr. Loveden's family, and Haynes, her own maid. The person, who gives the most particular account of these circumstances, is a man who seems to have behaved with great zeal for his master's honour, with fidelity, and with considerable prudence and forbearance, and that is Warren Hastings. The account which he gives is this. He says, "It was Mr. Loveden's custom, for many years, to go to Abingdon on the 8th of August, to attend a school-meeting or mayor's feast; and to send two bucks and dine there; and as it was seventeen miles from Buscot Park, he used generally to sleep there, and he did not return till the following day: that it was very well known to his wife that such was his intention on the 8th of August. That two days previous to that day, the deponent had entertained a strong suspicion that it was the purpose of Mrs. Loveden to introduce Mr. Barker into the house, on the night during which Mr. Loveden was certainly to be absent; for he says, that on the 6th of the month, two days before, she had called to him over the baluster that she wanted some oil, and that he the deponent gave some in a table spoon to James Dawson, then Mrs. Lintall's servant, who took the same to her; and at the time he gave it to James Dawson, he told Dawson that he knew what she wanted the oil for, and that she had got some mischief in her head; for his suspicions had been awakened on the morning of the 28th of July, from the circumstance of having observed a noise made in opening the billiard room door, which stuck at the top, and after listening a little he heard the door shut again and locked; and what more particularly awakened his suspicions, and from which he believed that Mrs. Loveden had had Mr. Barker in the house that night, was, that she had a carpenter's man sent for from Farringdon on the 30th of July, who came and, by her own directions, planed the top of the billiard-room door, and made it go easy; and from those circumstances he strongly suspected that she meant to use this oil for the purpose of oiling the doors leading from the billiard-room to the conservatory or green-house, so that she might introduce Mr. Barker into the house unheard by any person. That accordingly a few minutes after he went and examined all the doors leading from the conservatory into the vestibule, through a little room into Mr. Loveden's dressing room, from thence into the vestibule, and from thence into the billiard-room, and found them every one oiled, and he knew that they had not been oiled before that time. He says that the next day she asked for more oil, which she applied to all the doors leading to her own bed-room." From these circumstances, and from another circumstance which he mentions, "That her maid communicated to him that her mistress had made rather unusual preparations in her bed-room, by getting lavender, hyacinth roots, roses, and other flowers, of which Mr. Barker was very fond; the deponent was pretty certain that that was the night Mrs. Loveden intended to get Mr. Barker into the house through the conservatory, and from thence by the doors before described; and they agreed to watch together in order to detect it. Arrangements were accordingly made, and the housekeeper and the lady's maid among others, were to take their stations for the purpose of observation. He states, that about eleven o'clock, Mrs. Loveden having rung the bell to take away the supper things, he went into the library for that purpose, and found that Mrs. Loveden had then gone up to her bed-room; and after having taken the supper things away, he went down stairs again, and sat within his own pantry door, having

concealed his candle, for the purpose of seeing Mrs. Loveden let Mr. Barker into the house, and then they were to surprize him. That that night was quite a moonlight night, being the full of the moon, and that Mrs. Loveden could from the windows of her bed-room plainly see any person approach the house. That about half past eleven o'clock, Mrs. Loveden having come out of her bed-room into the passage, and the female servants having discovered themselves too soon, and having been asked by their mistress what they were doing there, for they were looking through the baluster of the attic story, they told her they were sure there was a man in the house, and desired the witness to come up stairs and search the house:—he went up stairs to the bed-room floor, having first locked the back stairs door to prevent the escape of any one that way, and he then passed Mrs. Loveden, who was in her bed-gown and night-cap, and leaning with her face in her hands over the baluster; that he searched all the rooms on the best bed room floor, but found no person therein. There was a candle which had been lighted in a room above, which these witnesses supposed to be a signal to Mr. Barker, lighted up by Mrs. Loveden, to invite him to the house, on some agreement they had entered into before; but this light was extinguished by the wind." He says, "That he went down stairs, and that he examined and found nobody; that he then went out into the plantations, being confident that Mr. Barker had either approached or entered the house though he had not seen him,—satisfied that these arrangements which had been made were not made for nothing, but that he was to be found in the neighbourhood if not in the house. He went into the plantations, where he was for a considerable time. Mrs. Loveden, he says, appeared to be greatly agitated when he went up to search the rooms, and he also saw her looking out of her bed-room window, which he concluded was a signal for Mr. Barker to keep out of sight. After remaining in the grounds for some time, he came back again to the house, but he went out again some time afterwards armed with a pistol; and then being alarmed by the noise of some person jumping off the top of the privy or the shed adjoining to it, he instantly made for the spot, and there he immediately found the gentleman he was in search of, Mr. Barker.—He told him, You are the man I am in search of: and the deponent then ordered him immediately off the premises, and said he was astonished at his boldness in attempting to enter the house at such a time; and Mr. Barker seeing the deponent was in a great passion, begged him not to be so loud, and entreated the deponent to let him go under Mrs. Loveden's window just to speak to her by way of explaining himself, and said that he should hear every word he had to say: he refused his request, and he then again repeated it: he was at last induced to consent that he might speak to Mrs. Loveden at her window; he walked with him along part of the front of the house; but before they got under the window, Mrs. Loveden had shut her shutters close," having before been from her windows eagerly observing this witness's motions. "Mr. Barker declined going on, saying that the servants might be on the watch, and might hear what he had to say; and Mr. Barker then said he wished to speak to the deponent, and drew him for that purpose under the elm trees, where they remained in conversation together near three quarters of an hour. Hastings reproached Mr. Barker with ingratitude to Mr. Loveden, in coming to disturb his peace of mind and the peace of his family, who had always treated him in the

most friendly manner; and then told him his conduct towards Mrs. Loveden on the preceding Christmas had been noticed by all the company; which he said he knew; and the deponent added, that the under-game-keeper had seen him in a familiar or unbecoming situation with Mrs. Loveden, and had talked of it all over the country; and that another person, Miller, a horse-dealer, had mentioned it at the public markets, and so on. He admitted that he had been so seen; and the deponent told him he knew that his own father (that is Mr. Barker, sen.) had given orders that he should not visit the family any more; and added, that on account of such the conduct of Mrs. Loveden and Mr. Barker to each other, neither his father nor his family had for some time visited at Buscot House, as they had before done when on a friendly intimacy. Mr. Barker admitted the truth of all he said; and Hastings told him that pursuing that line of conduct would be the ruin of the peace of mind of Mrs. Loveden and her mother and family. He asked him how he dared approach the house, and for what purpose he came. He made some excuse that he merely wanted to speak to Mrs. Loveden, to caution her not to write to him any more:—he said that the story would not do.—The conversation proceeded: and at last he promised him (the deponent having positively declared he would inform Mr. Loveden of the discovery he made if he, Mr. Barker, ever came to the house any more) that he would pledge himself he never would come again. He shook the deponent by the hand, and accordingly gave his word of honour that he never more would come to the house; soon after which they parted.” It appeared that this man kept his word; for when he came into the house he told the other servants, who were in the confederacy with him to discover Mr. Barker, that he had never seen him. They, however, had their suspicions; for it appears, from the evidence of Monk and others, that they suspected Hastings had actually surprised Mr. Barker in the garden.

The next morning Rachael Monk came to him in his bed-room, and told him Mrs. Loveden wished to speak to him. On his entering her dressing-room, she first desired him to shut the room-door. He remonstrated against this. She said she had been wrong in sending for him so early, and by the house-maid, who knew nothing of what had passed on the preceding night. He says, “That she then came close to the deponent, and crying very much, said, O Hastings, what a miserable night I have passed! I am a ruined woman for ever. Upon which the deponent told her that her conduct had been very imprudent; that he had been watching for three nights, and that he knew Mr. Barker was coming, and that she was to have let him in from the conservatory, through the dressing-room and the billiard room, and that she had oiled the locks and hinges of the doors of those rooms leading to the conservatory, to prevent their making a noise; and he also spoke of the wax candle which she had burning on the hearth of her said dressing-room; and said he knew she was first to have taken Mr. Barker into such dressing-room, and afterwards into her bed-room. She confessed to the deponent she had oiled the locks of the doors, that she had intended to have introduced Mr. Barker into the house, and into the room in the way above mentioned, but that she would never do so again, and would keep no correspondence with him, and begged and prayed of the deponent that he would conceal from her husband and every person what had so passed the preceding night; which he did.”

Here is the direct acknowledgment of both parties, at least going to the extent of nocturnal and clandestine meetings; and from the other facts there can be no doubt whatever of the intention of such a meeting as this. Is not the proof of a young man, being privately introduced into the house, evidence of the fact of adultery passing? It is said in this case, it was prevented. And so it might be. But if it shall appear that other clandestine and nocturnal meetings are contrived, and did actually take place, there can be no doubt what conclusion in reason, and law, and justice, ought to follow from the facts here stated; namely, the concert of the parties, and the fact that took place in consequence of this concert. It does appear certainly that for some time after this, great caution was observed. I think nothing further appears during that year, except the writing these letters, which took place in the November following. In these letters she laments the difficulties under which their connexion was laid by the alteration of the grounds, which had made every part of them visible to every eye; that it was impossible, therefore, for them to take advantage of the plantations and shrubberies; that the hovels were unfit to enter, and the barns kept locked: but she intimates, in that letter, that there was a possibility of his being admitted at the hall window.

The occurrence next referred to is that which took place in the month of March 1809. Mr. Loveden was in the habit of going to visit his son Mr. Pryse, at Woodstock. Mrs. Loveden declined paying this visit in company with him: and then the facts occurred which led to the open disclosure of all this intercourse, which had now been going on, certainly for a considerable number of years, utterly unknown to the master of this family. The person, to whose evidence I shall principally resort in this case, is Hastings,—he being corroborated, as he is, by all the other witnesses, particularly by Haynes and by Calcutt, in the most exact manner. He says, that upon the 8th of March Mr. Loveden went to his son-in-law's;—that she declined the invitation given to her to accompany her husband;—that the day after Mr. Loveden set off for Woodstock, Mrs. Loveden dressed herself in a most elegant manner, and more so than she was accustomed to do: that is proved also by the other witnesses;—and that she used to dizen and adorn herself; and that she was very much in the habit of doing so while her husband was absent: and it appears that attentions to her person were very much recommended to her by Mr. Barker, so far as one can judge from the letters which are produced. He says, that Elizabeth Haynes having communicated to him that Mr. Barker had been introduced into the house secretly, and had slept with Mrs. Loveden on the nights of Wednesday and Thursday, the 8th and 9th; and Hannah Calcutt having locked all the doors on the ground-floor, they were at a loss to know how he could possibly have got into the house. The suspicion of this witness being, that it must have been by means of the hall window from the steps on the outside, and that Mrs. Loveden concealed him in a room called the study, upon the ground-floor; the maids, to whom he communicated this suspicion, told him that it was quite impossible, for that nobody but Mr. Loveden was thought to have a key of the study. He, however, was satisfied that must have been the place in which she concealed him, and that she must have a key of the study for that purpose. That she had a key is clear; for it appears that, on a communication subsequently made to her of the discovery, she delivered up the key to Mr. Pryse, in

answer to his demand. He determined to watch in the butler's pantry on Friday night, being the 10th of the month of March, to discover if Mr. Barker or any person was let into the house by the hall window, which he could plainly hear from that place; that he accordingly took his stand there about six o'clock in the evening of this day, that he continued there till about half past nine, except when he went to answer the bell in the library; that whilst he was on the watch, just at nine o'clock, the kitchen-maid having opened the deponent's pantry door where he was sitting, he at that instant saw Mrs. Loveden run down the vestibule stairs leading to the billiard-room, and unlock the billiard-room door, which is on the basement story; and after having heard her open a book-case therein, she immediately ran up stairs; he saw her run across the great hall, and open the shutters and throw up the sash of the east window of the said hall; that he then plainly heard some person alight from the said hall window on the floor, and instantly heard Mrs. Loveden and the person whom she had so let in walk through the breakfast room to the study door, which he then heard unlocked and two persons go therein. He says that his bed-room is under part of this study, and in order that he might with greater certainty hear what passed in the study over head, he got upon the table so as to raise himself nearer the floor; that he heard a person, who he was sure was Mrs. Loveden, go out of the study and lock the door thereof on the outside in the breakfast room, and go from thence into the library and shut the door thereof; and after that, he plainly heard a person move over head in the study; and the library bell having then rung, he took up a glass of wine: that he took the opportunity of looking through the key-hole of the study to see if there was a light in the study; but he was prevented from so doing by the key-hole being stopped in the inside by paper. He says that he then opened the mahogany door which leads into the hall from the grand stair-case, by means of which being left open the passage through the house from the stair-case hall is lighted by a large reflecting lamp in the stair-case hall, the said door being always left open for such purpose: he had observed it had been shut once or twice that night by some person, although he had as often set it open again:—that he then went down stairs, told the housekeeper and the other persons who were on the watch, that he was very certain a person was there, but that they would not believe him; that they said it was quite impossible—he, however, said he was confident of it:—that he saw the mahogany door which he had opened was again shut. That he took up the supper to Mrs. Loveden about ten o'clock; that he then found the mahogany door again set open; from which circumstance, and from afterwards having listened in his bed-room, he verily believes that Mrs. Loveden had taken such person from the study up stairs into her own bed-room; and he is confirmed in that belief by his having heard two persons in Mrs. Loveden's bed-room after she had gone up stairs to bed about eleven o'clock at night: and he is very certain that at that time he heard the conversation of two persons in her bed-room. Haynes was below stairs, because they had been both together there; and he says that Mrs. Loveden having rung the bell, Haynes, who was below stairs, in the house-keeper's room, went up to answer the same; and before she could get up stairs he heard Mrs. Loveden run across her bed-room several times in great haste. He sat up watching till two o'clock, but saw nothing further.

The next witness who comes in here in the order of time of the transaction, is Haynes, the maid: and she says, that her mistress had been dressed much more gaily that day than at other times; that she went to bed much earlier than she had been accustomed to do; that when she attended to put her to-bed as usual, she observed that Mrs. Loveden seemed much confused, and acted strangely; that instead of lying on her own side of the bed when she got therein, as she used to do, she lay quite in the middle of the bed, as if to tumble it more than usual, and directed the deponent to draw the curtains close to the feet of the bed, which she never before had done; from which she had her suspicions that he was to be admitted on these nights; and that they having communicated their observations to each other, that she had had her bedroom put in more order—had removed several useless things,—had got flowers in her room, and that she appeared confused and agitated, and that she, the witness, being informed that night by Hastings, that he had heard Mrs. Loveden let Mr. Barker into the study, about nine o'clock at night, and that he could hear him move therein; she was led more particularly to notice the conduct of Mrs. Loveden when she attended as usual to put her to-bed. That about eleven o'clock Mrs. Loveden having got up to her bed-room and rung her bell, she attended her in her bed-room to put her to-bed, and during the time she was so doing she observed Mrs. Loveden to be extremely flurried and confused; that she kept her eyes upon the deponent whenever she moved, and particularly when she went near the windows, the curtains of which were drawn, which the deponent then thought was very suspicious; and on the following morning, being Saturday, the 11th of the month, when the deponent went at the usual hour, she observed that she looked very much confused, and she particularly noticed that the bed was extremely tumbled, and had the appearance of two persons having lain therein on the preceding night.

On the next morning it appears that Hastings being fully satisfied that there was a person in the study, who had returned by that time to it, she being seen carrying breakfast things into that study, and it being cold, and it therefore being probable there would be some fire, he was curious to observe whether there would be any smoke issuing out of the study chimney: he went and saw there was, and he then went and made a demand of the key from Mrs. Loveden. She resisted,—he said he was sure there was a fire in the room—she said there was none—he said he was certain there was—she said if there was it could do no mischief, that it was so strongly divided from the other rooms that no injury could ensue—she affected to look through the key-hole, and ridiculed their fears.—He said it was impossible she should see any thing, because the key-hole was stopped: and at last he insisted on breaking open the door, for that the party, of whom he was in quest, was there. She resisted this a good while; and he was after a long time persuaded to take another course; namely, to call in the assistance of some carpenters who were at work: they opened the windows of that room, and therein was found Mr. Barker endeavouring to conceal himself by standing up as close as he could to the wall.—Upon that the disclosure took full effect—the door was afterwards opened, and conversations passed, in which there was a full admission that he had come into the house the night before, and that he had been in the house, and was so introduced by this lady. A servant was immediately sent off with a communication to

Mr. Pryse at Woodstock, who communicated it afterwards to the husband: and steps have been taken since, which bring this cause for a separation before this Court.

Upon the whole of this evidence, the difficulty which has really occurred to me, is to conceive how there can be a doubt of the fact—it appears to me hardly possible—it is evidence, so far as I see, that is hardly capable of explanation or observation; and it is, in itself, so direct and consistent, that no observation can apply it more closely to the conviction of any man's mind that has occasion to peruse it.

It has been said, that either there has been no verdict in this case, or that, if an action was brought, it must be presumed that the verdict was unfavourable to Mr. Loveden; because it is not, as usual, noticed in the proceedings in this cause. Certainly it is usual to plead the verdict where damages have been obtained against the adulterer; but it will be recollected that the introduction of verdicts was long since resisted in this Court, and it is now perfectly understood that they are introduced merely as circumstances of evidence; and that a party does not stand upon a higher footing in a case here agitated between different parties and upon other evidence. Judicially I am not informed whether any verdict of any kind was obtained; but supposing the fact to be as understood, that an action was brought, and that there was a failure in that action, that is not a matter from which any thing can be drawn to the prejudice of the evidence that has been adduced here.—What produced the failure there, it is not for me to speculate upon—whether it arose from any negligence on the part of Mr. Loveden, or of his agents—whether from any undue confidence in the sufficiency of the evidence which he there adduced—whether much of the evidence which is here adduced might be adducible there.

The letters, I presume, which are demonstrated against this lady here, would not be, in their present form, evidence against him, for they are letters which he never received. Whether, if they had been actually received by Mr. Barker, and he, after the receipt of such letters as these, had continued that sort of intercourse with this lady, which is here proved to have existed, the receipt of such letters, coupled with his conduct after the receipt of them, might not have been admitted consistently with the rules by which the wisdom of those courts regulates the admission of evidence, it is not for me to say. But, however, that case failed. It is a matter, however, that is utterly out of the view of this Court, and out of all further explanation here, and nothing that passed there can affect the sufficiency of evidence here, if the evidence adduced here is sufficient to bring one's mind fairly to the conclusion; for it is upon the evidence adduced here that the cause must here be determined.

I am most clearly of opinion that the evidence adduced here must lead to the conclusion of adultery. I am most perfectly satisfied that repeated acts of adultery have been committed between these parties; that an adulterous connection subsisted between them for a very considerable length of time; and that Mr. Loveden is most unquestionably entitled to the sentence which he prays,—of separation by reason of the repeated acts of adultery which have taken place.

Marriage,—by contract without religious celebration, according to the law of Scotland, held to be valid: Distinction, as to the state of one of the parties, being an English officer on service in that country, not sustained.

THIS was a case of restitution of conjugal rights, brought by the wife against the husband, in which the chief point in discussion was, the validity of a Scotch marriage, *per verba de presenti*, and without religious celebration: one of the parties being an English gentleman, not otherwise resident in Scotland, than as quartered with his regiment in that country.

JUDGMENT.

SIR WILLIAM SCOTT.

The facts of this case, which I shall enter upon without preface, are these: Mr. John William Henry Dalrymple is the son of a Scotch noble family; I find no direct evidence which fixes his birth in England, but he is proved to have been brought up from very early years in this country. At the age of nineteen, being a cornet in his majesty's dragoon guards, he went with his regiment to Scotland in the latter end of March, or beginning of April 1804, and was quartered in and near Edinburgh during his residence in that country. Shortly after his arrival, he became acquainted with Miss Johanna Gordon, the daughter of a gentleman in a respectable condition of life. What her age was does not directly appear, she being described as of the age of twenty-one years and upwards: she was however young enough to excite a passion in his breast, and it appears that she made him a return of her affections: he visited frequently at her father's house in Edinburgh, and at his seat in the country, at a place called Braid. A paper without date, marked No. 1, is produced by her: it contains a mutual promise of marriage, and is superscribed, "a sacred promise." A second paper, No. 2, produced by her, dated May 28, 1804, contains a mutual *declaration* and *acknowledgment* of a marriage.—A third paper, No. 10, produced by her, dated July 11, 1804, contains a *renewed declaration* of marriage made by him, and accompanied by a promise of acknowledging her, the moment he has it in his power; and an engagement on her part, that nothing but the greatest necessity shall compel her to publish this marriage. These two latter papers were inclosed in an envelope, inscribed "Sacred Promises and Engagements," and all the three papers are admitted, or proved in the cause, to be of the handwriting of the parties, whose writing they purport to be.

It appears that Mr. Dalrymple had strong reasons for supposing, that his father and family would disapprove of this connection, and to a degree that might seriously affect his fortunes; he, therefore, in his letters to Miss Gordon, repeatedly enjoined this obligation of the strictest secrecy; and she observed it, even to the extent of making no communication of their mutual engagements to her father's family; though the attachment, and the intercourse founded upon it, did not pass unobserved by one of her sisters, and also by the servants, who suspected that there were secret ties, and that they *were* either already, or soon *would* be married.—He wrote many letters to her, which are exhibited in the cause, expressive of the warmest and most devoted passion, and of unalterable fidelity to his engagements, in almost all of them applying the

*"This opinion has been returned after a perusal of the whole
beauty and loveliness of the woman was not in doubt"*

terms of husband and wife to himself and her.—It appears that they were in the habit of having clandestine nocturnal interviews, both at Edinburgh and Braid, to which frequent allusions are made in these letters. One of the most remarkable of these nocturnal interviews passed on the 6th of July at Edinburgh, where she was left alone with two or three servants, having declined to accompany her father and family (much to her father's dissatisfaction) to his country-house at Braid. There is proof enough to establish the fact, in my opinion, that he remained with her the whole of that night. He continued to write letters of a passionate and even conjugal import, and to pay nocturnal and clandestine visits during the whole of his stay in Scotland; but there was no cohabitation of a more visible kind, nor any habit and repute, as far as appears, but what existed in the surmises of the servants and the sister. His stay in that country was shortened by his father, who came down, alarmed, as it should seem, by the report of what was going on, and removed him to England on or about the 21st of July.

The correspondence appears to have slackened, though the language continued equally ardent, if I judge only from the number exhibited of the letters written after his return; though it is possible, and indeed very probable, there may be many more which are not exhibited. No letters of Miss Gordon's, addressed to him, are produced; he has not produced them, and she has not called for their production. In England he continued till 1805, when he sailed for Malta: his last letter, written to her on the eve of his departure, reinforces his injunctions of secrecy; and conjures her to withhold all credit from reports, that might reach her of any transfer of his affections to another: it likewise points out a channel for their future correspondence, through the instrumentality of Sir Rupert George, the first Commissioner of the Board of Transports. He continued abroad till May 1808, with the exception of a month or two in the autumn of 1806, when he returned for a purpose unconnected with this history, unknown to his father, and, as it appears, to this lady. It is upon this occasion, that the alteration of his affection first discloses itself in conversations with a Mr. Hawkins, a friend of his family, to whom he gives some account of the connection which he had formed with Miss Gordon in Scotland, complains of the consequences of it, in being tormented with letters from her, which he was resolved never to read in future; and having reason to fear she would write others to his father, he requested Mr. Hawkins, to use all means of intercepting any letters, which she might write either to the one or the other.

Mr. Hawkins executed this commission by intercepting many letters so addressed; though, in consequence of her extreme importunity, he forwarded two or three, as he believes, of those addressed to Mr. Dalrymple; and he at length wrote to her himself, about the end of 1806, or beginning of 1807, and strongly urged her to desist from troubling General Dalrymple with letters. This led to a correspondence between her and Mr. Hawkins; and it was not till the death of Mr. Dalrymple's father (which happened in the spring of the year 1807) that she then asserted her marriage rights, and furnished him with copies of these important papers, which she denominates, according to the style of the law of Scotland, her "Marriage Lines." She took no steps to enforce her rights by any process of law. Upon the unlooked-for return of Mr. Dalrymple, in the latter end of May 1808, he immediately visited Mr.

Hawkins, who communicated what had passed by letter between himself and Miss Gordon; and suffered him, though not without reluctance, to possess himself of two of her letters, which Mr. Dalrymple has exhibited. Mr. Hawkins however dismissed him with the most anxious advice to adhere to the connection he had formed; and by no means to attempt to involve any other female in the misery, that must attend any new matrimonial connection. Within a very few days afterwards, Mr. Dalrymple marries Miss Laura Manners, in the most formal and regular manner. Miss Gordon, who had before heard some reports of no very definite nature, instantly, upon hearing authentic news of this event, takes measures for enforcing her rights; and being informed that he is amenable only to this jurisdiction, she immediately applies for its aid, to enforce the performance of what she considers as a *marriage contract*.

The cause has proceeded regularly on both sides, and has been instructed with a large mass of evidence, much of it replete with legal erudition, for which the Court has to acknowledge great obligations to the gentlemen who have been examined in Scotland. It has also been argued with great industry and ability by the counsel on both sides, and now stands for final judgment. Being entertained in an *English* Court, it must be adjudicated according to the principles of *English* law, applicable to such a case. But the only principle applicable to such a case by the law of England, is, that the validity of Miss Gordon's marriage rights must be tried by reference to the law of the country, where, if they exist at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland.

I am not aware that the case so brought here is exposed to any serious disadvantage, beyond that which it must unavoidably sustain in the inferior qualifications of the person, who has to decide upon it, to the talents of the eminent men, to whose judgment it would have been submitted, in its more natural Forum. The law-learning of Scotland has been copiously transmitted; the facts of the case are examinable on principles common to the law of both countries, and indeed to all systems of law. It is described as an advantage lost, that Miss Manners, the lady of the second marriage, is not here made a party to the suit; she might have been so in point of form, if she had chosen to intervene; in substance she *is*; for her marriage is distinctly pleaded and proved, and is as much therefore under the eye, and under the attention, and under the protection of the Court, as if she were formally a party to the question respecting the validity of this marriage, which is in effect to decide upon the validity of her own. For I take it to be a position beyond the reach of all argument and contradiction, that if the *Scotch* marriage be legally good, the second or *English* marriage must be legally bad. Another advantage intimated to be lost is this, that the Native Forum would have compelled the production of her letters to him, for the purpose of seeing whether any thing in them favoured his interpretation of the transaction. Surely, according to any mode of proceeding, there can be no need of a compulsory process, to extract them from the person, in whose possession they must be, if they exist at all. If they contain such matter as would favour such an interpretation, he must be eager to produce them, for they would constitute his defence; not being produced, the necessary conclusion is, either that they do not exist, or

that they contain nothing, which he could use with any advantage for such a purpose. The considerations that apply to the indiscretions of youth, to the habits of a military profession, and to the ignorance of the law of Scotland, arising from a foreign birth and education, are common to both, and I might say, to all systems of law. They are circumstances, which are not to be left entirely out of the consideration of the Court, in weighing the evidence for the establishment of the facts, but have no powerful effect upon the legal nature of the transaction when established.

The law, which, in both countries, allows the minor to marry, attributes to him, in a way which cannot be legally averred against, upon the mere ground of youth and inexperience, a competent discretion to dispose of himself in marriage; he is arrived at years of discretion, *quoad hoc*, whatever he may be with respect to other transactions of life, and he cannot be heard to plead the indiscretion of minority. Still less can the habits of a particular profession, exonerate a man from the general obligations of law. And with respect to any ignorance arising from foreign birth and education, it is an indispensable rule of law, as exercised in all civilized countries, that a man who contracts in a country, engages for a competent knowledge of the law of contracts in that country. If he rashly presumes to contract without such knowledge, he must take the inconveniences resulting from such ignorance upon himself, and not attempt to throw them upon the other party, who has engaged under a proper knowledge and sense of the obligation, which the law would impose upon him by virtue of that engagement. According to the judgment of all the learned gentlemen who have been examined, the law of Scotland binds Mr. Dalrymple, though a minor, a soldier, and a foreigner, as effectively as it would do, if he had been an adult, living in a civil capacity, and with an established domicile in that country.

The marriage, which is pleaded to be constituted, by virtue of some or all of the facts, of which I have just given the outline, and to which I shall have occasion more particularly to advert in the course of my judgment, has been in the argument described as a *clandestine* and *irregular* marriage. It is certainly a *private* transaction between the individuals, but it does not of course follow that it is to be considered as a *clandestine* transaction, in any ignominious meaning of the word; for it may be, that the law of the country, in which the transaction took place, may contemplate private marriages, with as much countenance, and favour, as it does the most public. It depends likewise entirely upon the law of the country, whether it is justly to be stiled an *irregular* marriage. In some countries one only form of contracting marriage is acknowledged, as in our own, with the exception of particular indulgences to persons of certain religious persuasions; saving those exceptions, all marriages not celebrated according to the prescribed form, are mere nullities; there is and can be no such thing in this country as an irregular marriage. In some other countries, all modes of exchanging consent being equally legal, all marriages are on that account equally regular. In other countries, a form is recommended and sanctioned, but with a toleration and acknowledgment of other more private modes of effecting the same purpose, though under some discountenance of the law, on account of the non-conformity to the order that is established. What is the law of Scotland upon this point?

Marriage, being a contract, is of course *consensual* (as is much insist-

ed on, I observe, by some of the learned advocates) for it is of the essence of all contracts, to be constituted by the consent of parties. *Consensus non concubitus facit matrimonium*(a), the maxim of the Roman civil law, is, in truth, the maxim of all law upon the subject; for the *concubitus* may take place, for the mere gratification of present appetite, without a view to any thing further; but a marriage must be something more; it must be an agreement of the parties looking to the *consortium vitæ*(b): an agreement indeed of parties capable of the *concubitus*, for though the *concubitus* itself will not constitute marriage, yet it is so far one of the essential duties, for which the parties stipulate, that the incapacity of either party to satisfy that duty nullifies the contract(c).—Marriage, in its origin, is a contract of natural law; it may exist between two individuals of different sexes, although no third person existed in the world, as happened in the case of the common ancestors of mankind: It is the parent, not the child of civil society, "*Principium urbis et quasi seminarium Reipublicæ*(d)."—In civil society it becomes a civil contract, regulated and prescribed by law, and endowed with civil consequences. In most civilized countries, acting under a sense of the force of sacred obligations, it has had the sanctions of religion superadded: It then becomes a religious, as well as a natural, and civil contract; for it is a great mistake to suppose that, because it is the one, therefore it may not likewise be the other. Heaven itself is made a party to the contract, and the consent of the individuals, pledged to each other, is ratified and consecrated by a vow to God. It was natural enough that such a contract should, under the religious system which prevailed in Europe, fall under ecclesiastical notice and cognizance, with respect both to its theological and its legal constitution; though it is not unworthy of remark that, amidst the manifold ritual provisions, made by the Divine Lawgiver of the Jews for various offices and transactions of life, there is no ceremony prescribed for the celebration of marriage. In the Christian church marriage was elevated in a later age to the dignity of a sacrament, in consequence of its divine institution, and of some expressions of high and mysterious import respecting it contained in the sacred writings. The law of the Church, the canon law (a system which, in spite of its absurd pretensions to a higher origin, is in many of its provisions deeply enough founded in the wisdom of man,) although, in conformity to the prevailing theological opinion, it revered marriage as a sacrament, still so far respected its natural and civil origin, as to consider, that where the natural and civil contract was formed, it had the full essence of matrimony without the intervention of the priest; it had even in that state the character of a sacrament;(e) for it is a

(a) D. lib. 50. tit. 17. l. 30. de Reg. Juris.—D. lib. 35. tit. 1. l. 15.—Huber, de Nuptiis, p. 23. lib. 24. tit. 2. de Divortii.—Voet., lib. 23. tit. 2. s. 2.—Vinnius, lib. 1. tit. 9. s. 1.—Cujac, in D. de Rit. Nup. v. 1. p. 800. in Cod. lib. 5. tit. 1. de Spons. et Arrhis.—Taylor's Civil Law, p. 301. Puffendorf. b. 6. c. 1. s. 14.—Wood's Instit. book 1. chap. 1.—27. qu. 2. c. 1. Matrimonium.—27. qu. 2. c. 2. Sufficiat.—27. qu. 2. c. 5. Cum initiatur.—27. qu. 2. c. 6. Conjuges.—C. 25. Extra. de Spons. et Matrim.—Huber., Eunom. Rom. ad lib. 23. Pand. Vind. s. 1.—Hoppii, commen. ad Ins. lib. 1. tit. 10.—Wood's Instit. book 1. chap. 2. Ayl. Parerg. 362.

(b) D. lib. 23. tit. 2. l. 1.—Instit. lib. 1. tit. 9. s. 1.

(c) C. 2. et 3. Extra. de Spons. et Matrim.—Vinnius, lib. 1. tit. 9. s. 1.—Burn's Eccles. Law, v. 2. p. 500. Ayl. Par. 226.

(d) Cic. de Off. 1. 17.

(e) Sanchez, lib. 2. disp. 6. s. 2. et lib. 2. disp. 10. s. 2.—Father Paul, p. 737.—Pallavicini, lib. 23. chap. 8.—Pothier, tit. 3. p. 290.—27. qu. 2. c. 10. omne.

misapprehension to suppose, that this intervention was required as matter of necessity, even for that purpose, before the council of Trent. It appears from the histories of that council, as well as from many other authorities, that this was the state of the earlier law, till that council passed its decree for the reformation of marriage: The consent of two parties^(a) expressed in words of present mutual acceptance, constituted an actual and legal marriage, technically known by the name of *Sponsalia per verba de presenti*, improperly enough, because *sponsalia*, in the original and classical meaning of the word, are preliminary ceremonials of marriage, and therefore, Brower justly observes, *jus pontificium nimis laxo significatu, imo etymologia invita ipsas nuptias sponsalia appellavit* [L. 1. c. 1. n. 6.].—The expression, however, was constantly used in succeeding times to signify clandestine marriages, that is, marriages unattended by the prescribed ecclesiastical solemnities, in opposition, first, to regular marriages; secondly, to mere engagements for a *future marriage*, which were termed *sponsalia per verba de futuro*, a distinction of *sponsalia* not at all known to the Roman civil law. [Swinburn, Sect. 3. §. 3.] Different rules, relative to their respective effects in point of legal consequence, applied to these three cases—of regular marriages,—of irregular marriages,—and of mere promises or engagements. In the regular marriage every thing was presumed to be complete and consummated both in substance and in ceremony.—In the irregular marriage every thing was presumed to be complete and consummated in substance but not in ceremony; and the ceremony was enjoined to be undergone as matter of order. [Swinburn, Sect. 17. §. 1.].—In the promise or *sponsalia de futuro*, nothing was presumed to be complete or consummate either in substance or ceremony. Mutual consent would release the parties from their engagement; [C. 2. Extra. de Spons. et Matrim.] and one party, without the consent of the other, might contract a valid marriage, regularly or irregularly, with another person; but if the parties who had exchanged the promise had carnal^(b) intercourse with each other, the effect of that carnal intercourse was to interpose a presumption of present consent at the time of the intercourse, to convert the engagement into an irregular marriage, and to produce all the consequences attributable to that species of matrimonial connection. I spare myself the trouble of citing from the text books of the Canon Law, the passages that support these assertions. Several of them have been cited in the course of this discussion, and they all lie open to obvious reference in Brower and Swinburn, and other books that profess to treat upon these subjects. The reason of these rules is manifest enough. In proceedings under the canon law, though it is usual to plead consummation, it is not necessary to prove it, because it is always to be presumed in parties not shown to be disabled by original infirmity of body. In the case of a marriage *per verba de presenti*, the parties there also deliberately accepted the relation of husband and wife, and consummation was presumed as naturally following the acceptance of that relation, unless controverted in like manner. But a promise *per verba de futuro* looked to a future time; the marriage which it contem-

(a) C. 25. et C. 31. Extra. de Spons. et Matrim.—C. 3. Extra. de Sponsa Duorum.—Swinburn, sect. 4. s. 2, 3, 4. et sect. 18. s. 1.—Brower, lib. 1. cap. 2. s. 8, 9. et cap. 23. s. 12. et cap. 27. s. 21.

(b) C. 30. et 31. Extra. de Spons. et Matrim.—C. 3. Extra. de Sponsa duorum.—Brower, lib. 1. cap. 23.—Swinburn, Sect. 17. s. 11.

plated might perhaps never take place. It was defeasible in various ways; [Swinburn, Sect. 18. p. 1. et Sect. 4. p. 2.] and, therefore, consummation was not to be presumed; it must either have been proved or admitted. Till that was done, the relation of husband and wife was not contracted: it must be a promise *cum copula* that implied a present acceptance, and created a valid contract founded upon it. (Swinburn, Sect. 17. p. 11.)

Such was the state of the Canon Law, the known basis of the matrimonial law of Europe. At the Reformation, this country disclaimed, amongst other opinions of the Romish Church, the doctrine of a sacrament in marriage, though still retaining the idea of its being of divine institution in its general origin; and on that account, as well as of the religious forms that were prescribed for its regular celebration, an *holy estate*, *holy matrimony*, but it likewise retained those rules of the Canon Law which had their foundation not in the sacrament, or in any religious view of the subject, but in the natural and civil contract of marriage. The Ecclesiastical Courts, therefore, which had the cognizance of matrimonial causes, enforced these rules, and amongst others, that rule which held an irregular marriage, constituted *per verba de presenti*, not followed by any consummation shown, valid to the full extent of voiding a subsequent regular marriage contracted with another person. (Brower, 1. 22. 12.) A statute passed in the reign of Henry VIII. (32 Hen. 8. cap. 38. sec. 2.) proves the fact by reciting, that "Many persons after long continuance in matrimony, without any allegation of either of the parties, or any other at their marriage, why the same matrimony should not be good, just, and lawful, and after the same matrimony solemnized, and consummate by carnal knowledge, have by an unjust law of the Bishop of Rome, upon pretence of a former contract made, and not consummate by carnal copulation, been divorced and separate," and then enacts, "that marriages solemnized in the face of the Church, and consummate with bodily knowledge, shall be deemed good, notwithstanding any pre-contract of matrimony, not consummate with bodily knowledge, which either or both the parties shall have made." But this statute was afterwards repealed, as having produced horrible mischiefs, which are enumerated in very declamatory language, in the preamble of the statute 2 Edw. VI.; and Swinburn, speaking the prevailing opinion of his time, applauds the repeal, as *worthily and in good reason enacted*. The same doctrine is recognized, by the temporal Courts, as the existing rule of the matrimonial law of this country, in Bunting's case, 4 Coke, 29.—"John Bunting, father of the plaintiff, and Agnes Adenshall, contracted marriage *per verba de presenti*, and afterwards, on the 10th of Dec. 1555, the said Agnes took to husband Thomas Twede; and afterwards, on the 9th of July, Bunting libelled against her in the Court of Audience, *et decret. fuit quod prædict. Agnes subiret matrimonium cum præfato Bunting, et insuper pronunciatum fuit dictum matrimonium fore nullum*." Though the common law certainly had scruples in applying the civil(a) rights of dower, and community of goods, and legitimacy in the cases of these looser species of marriage. In the latter case of Collins and Jesson, 3 Anne, it was said by Holt, Chief Justice, and agreed to by the whole

(a) Swinburn, Sect. 1. s. 2. and Sect. 17. s. 29.—Tract de Repub. Ang. p. 103.—Perkins, tit. Feoffments, fol. 40. p. 38, Ed. 3. 12.—1 Roll. Abridg. 341. and 357.—Moor, 169.

Bench, that, "if a contract be *per verba de præsenti*, it amounts to an actual marriage, which the very parties themselves cannot dissolve by release or other mutual agreement, for it is as much a marriage in the sight of God, as if it had been in *facie ecclesiæ*." "But a contract *per verba de futuro*, which do not intimate an actual marriage, but refer to a future act, is releasable."—2 Salk. 437. Mod. 155. In *Wigmore's* case, 2 Salk. 438, the same judge said, "a contract *per verba de præsenti* is a marriage; so is a contract *de futuro*; if the contract be executed, and he take her, 'tis a marriage, and they cannot punish for fornication." In the Ecclesiastical Court the stream ran uniformly in that course. One of the most remarkable is that furnished by the diligence of Dr. Swabey, on account of its striking resemblance to the present case: I mean the case of Lord Fitzmaurice, son of the Earl of Kerry, coram Deleg. in 1732. There were in that case, as in the present, three engagements in writing: The first was dated June 23, 1724, and contained these words, "We swear we will marry one another." The second, dated July 11, 1724, was to this effect: "I take you for my wife, and swear never to marry any other woman." This last contract was repeated in December of the same year. It was argued there, as here, that the iteration of the declaration proved that the parties did not depend upon their first declaration, and was in effect a disclaimer of it. But the Court, composed of a full Commission, paid no regard to the objection, and found for the marriage, and an application for a commission of review, founded upon new matter alleged, was refused by the Chancellor. Things continued upon this footing till the marriage Act, 26 G. 2. c. 33. described by Mr. Justice *Blackstone*, (Book 1. chap. 15. s. 3.) "an innovation on our laws and constitution," swept away the whole subject of irregular marriages, together with all the learning belonging to it, by establishing the necessity of resorting to a public and regular form, without which the relation of husband and wife could not be contracted.

It is not for me to attempt to trace the descent of the matrimonial law of Scotland since the time of the Reformation. The thing is in itself highly probable, and we have the authority of Craig, lib. 2. dieg. 18. s. 17, for asserting that the Canon Law is its basis there, as it is every where else in Europe, "*totam hanc questionem pendere a jure pontificio*," though it is likely enough that in Craig's time, who wrote not long after the Reformation, the consistorial law might be very *unsettled*, as Mr. Cay in his deposition describes it to have been. It is, however, admitted by that learned gentleman, that it settled upon its former foundations, for he expressly says, that "the Canon Law in these matters is a part of the law of the land; that the Courts and lawyers reverence the decretals, and other books of the more ancient Canon Law;" and I observe that in the depositions of most of the learned witnesses, and indeed in all the *factums* that I have seen upon these subjects, they are referred to as authorities. Several regulations, both ecclesiastical and civil, canons and statutes, have prescribed modes of celebrating marriage. Mr. Cathcart, in particular, refers to them in his deposition. Some of these appear to have been made in times of great ferment, during the conflict between the Episcopal and Presbyterian parties, and are therefore, I presume, of transitory and questionable authority. Mr. Cathcart infers that the whole of the Scotch statutes hold solemnization by a clergyman, or, as he expresses it, some one assuming the functions of a clergyman,

as *necessary*. It rather appears difficult to understand this consistently with the fact, that other marriages have *always* been held legal and valid. What the form of solemnization by a clergyman is, I have not been accurately informed; prescribed ritual forms are not, I believe, admitted by the church of Scotland for any office whatever. Whether the clergyman merely receives the declaration as a witness, or pronounces the parties, by virtue of his spiritual authority, to be man and wife, as in our form, does not distinctly appear. I observe that Mr. Gillies says in his deposition, "that to make marriage valid, it is not necessary that it should be celebrated in *facie ecclesie*, but *rebus integris* it can only be constituted by a consent adhibited in the presence of a clergyman, or *in some mode equivalent to an actual celebration*." So Lord Braxfield in a loose note, which is introduced, is made to say, "Private consent is not the consent the law looks to; it must be before a priest, or *something equivalent*." Now what are these equivalents? and how to be provided? Are they to be carved out by the private fancy and judgment of the individuals? If so, though equivalent, they can hardly be deemed the regular forms, and yet appear to stand on a footing of equal authority. I observe, likewise, that a marriage before a magistrate is alluded to in some passages, as nearly equal to that before a minister, though certainly not a marriage in *facie ecclesie*, in any proper sense of that expression.

Sir Ilay Campbell states, in an opinion of his given to the English Chancery (Lib. Reg. A. 1780. f. 552.) in a case furnished to me by Dr. Stoddart, "that marriages, irregularly performed without the intervention of a clergyman, are censurable, and formerly the parties were liable to be fined or rebuked in the face of the church, *but this for a long time has not been practised*." The regulations, therefore, whatever they may be, are not penally enforced; and it does not appear, that they are enforced by any sense of reputation or of obligation imposed by general practice. The advocates, who describe the modes of marriage by the terms *regular* and *irregular*, seem, as far as I can collect, to attribute no very distinctive preference to the one over the other; at any rate the distinction between them is not very strongly marked in the existing usage of that country. Many of the marriages, which take place between persons in higher classes of society, are contracted in such *irregular* forms, if so to be denominated. They appear to create no scandal; to give no offence. The parties are not reprobated by public opinion, nor is legal censure actually applied. But taking it, that the distinction between the *regular* and *irregular* marriages was much stronger than I am enabled, by the present evidence, to suppose, the question still remains to be examined, how far actual consummation is required, by the law of Scotland, in marriages which are so to be deemed *irregular*.

The libel is drawn in a form not calculated to extract, simply and directly a distinct statement of what the law of Scotland may be upon this point; for it collects together all the points of which the party conceives she can avail herself, consummation included, as matters of fact and matters of law, and then alleges, that, by the law of Scotland this aggregate constitutes a marriage, without providing for a possible case in which she might establish some of these matters and fail in establishing others, *e. g.* if she failed in proof of a *copula*, but succeeded in establishing a solemn compact. If the law had been more distinctly understood here

at the commencement of this suit, the libel would probably have been drawn with more accommodation to the possible state of facts that might ultimately call for the proper specific rule of law. The advocates of Scotland have, to a great degree, supplied the want of that distinctness in the libel, by bringing forward the distinctions in their answers, and applying what they conceive to be the law, applicable to the possible case, that may result from the evidence; most of them have stated what they conceive to be the law, first, in the case of a promise *de futuro*; secondly, of a promise *cum copula*; thirdly, of a solemn declaration or acknowledgment of marriage; and fourthly, of such a declaration accompanied by a *copula*. It may be convenient to consider, first, whether the present case is a case of promise, or of present declaration and acknowledgment. It will be convenient to do so in two respects: The first convenience attending it is, that the fact itself is determinable enough upon the face of written existing instruments. It is not to be gathered from the loose recollections of loose verbal declarations, not guarded either in the expressions of those who made them, or in the memory of those who attest them. The second convenience resulting from this is, that a large portion of the inquiry into the other points of the case may, in a great degree, be rendered superfluous; for if these papers contain mere promises, then have I to consider only the law of promises, as referable to cases accompanied or unaccompanied by a *copula*, leaving out entirely the law that respects acknowledgment and declaration. On the other hand, if they are to be considered as acknowledgments, then the law of promises may be dismissed, except perhaps sometimes to be introduced incidentally for purposes of occasional illustration.

Whether they are to be considered as promises or declarations must be determined upon the contents of the instruments themselves, on such a view as the plain meaning of the words imports, and upon the information of their technical meaning as communicated by the Scotch lawyers; for it is possible that they may be subject to a technical construction different from their obvious meaning. This is the case in the marriage settlements of Scotland. The words of the *stipulatio sponsalitia* are present declaratory words; the parties mutually accept each other, but the engagements they enter into are always technically considered to be mere promises *de futuro*. Those, who are conversant in the books of the Canon Law, will recollect the extremely nice distinctions which that law and its commentators have made between expressions of a very similar import in their obvious meaning, as constituting contracts *de presenti*, or only promises *de futuro*.

The first paper is without date, and is merely a *promise*. Mr. Dalrymple promises to marry Miss Gordon *as soon as it is in his power*, and she promises the same; it is subscribed by both their names—is endorsed “A sacred promise;” and is left in her possession. It is pleaded to be the first that was executed by them, and it is highly reasonable to presume that it was so, for no person, I think, would be content to accept such a paper as this, after having received the papers which follow, marked 2, and 10. The paper marked No. 2. is dated on the 28th of May 1804, and contains these words, “I hereby *declare* Johanna Gordon is my lawful wife; and I hereby *acknowledge* John William Henry Dalrymple as my lawful husband.” I see no great difference between the expression *declare* and *acknowledge*; the words properly enough belong to the parties by whom they are respectively used, and

are perhaps not improperly adapted to the decorums of such a transaction between the sexes. No. 10 is a reiterated declaration on the part of Mr. Dalrymple, accompanied with a promise "that he will acknowledge Miss Gordon as his lawful wife the moment he has it in his power." She makes no repeated declaration, but promises that "nothing but the greatest necessity, (necessity which ——— situation alone can justify,) shall ever force her to declare this marriage." It is signed by him, and by her, describing herself *J. Gordon, now J. Dalrymple*, and it is dated July 11, 1804. Both the papers are enclosed in an envelope, on which is inscribed "Sacred promises and engagements." There *are* promises and engagements that would satisfy these terms, independent of the words which contain the declaration of the marriage. At the same time it is to be observed, that the words "promises and engagements" are not improperly applied to the marriage vow itself, which is prospective in its duties, which engages for the performance of future offices between the parties till death shall part them, and to which, in the words of our liturgy, *it plights their troth*, or in more modern language, pledges their good faith for that future performance. I feel some hesitation in acceding to the remark that the paper marked No. 2. is at all weakened or thrown loose by the mere engagement of secrecy, which seems to be the principal, if not the sole object of the latter paper, though Mr. Dalrymple has thrown in a renewed declaration of his marriage; that reiterated declaration, though accompanied with a promise of secrecy, cannot, upon any view of the case, be considered as a disclaimer of the former. An engagement of secrecy is perfectly consistent with the most valid, and even with the most regular marriages. It frequently exists even in them from prudential reasons; from the same motives it almost always does in private or clandestine marriages. It is only an evidence against the existence of a marriage, when no such prudential reasons can be assigned for it, and where every thing, arising from the very nature of marriage, calls for its publication.

Such is the nature of these exhibits; first, a promise; secondly that promise merged in the direct acknowledgment of the accomplished fact; thirdly, a renewed admission of the fact on his side, with a mutual engagement for secrecy, till the proper time for disclosure should arrive.

In these papers, as set up by Miss Gordon, resides the *constitution*, as some of the gentlemen, who have been examined, call it, or as others of them term it, the *evidences* of the marriage; for it is matter of dispute between these learned persons, whether such papers, when free from all possible impeachment, are *constituents*, or merely *evidences* of marriage. It appears to be a distinction not very material in its effects; because if it is to be considered that such papers, so qualified, are only to be treated as *evidences*, yet if free from all possible impeachments, on the grounds on which the law allows them, as evidences to be impeached, they make full faith of the marriage, they sustain it as effectually, as if, according to other ideas, they directly constituted it; they have then become *præsumptiones juris et de jure*, which establish the same conclusion, although in another way.

But these papers must be taken in conjunction with the letters which may controul or confirm them.—What is the effect of the letters? In almost all of them Mr. Dalrymple addresses Miss Gordon as his wife, and describes himself as her husband. In the first letter he insists upon it, that she shall draw upon him for any money she may stand in need

of, "for it is her right," and "in accepting of it she will prove her acknowledgment of it." Her sister he calls *his* sister. This letter appears by the post-mark to have been written before No. 2, and therefore has been said to be entirely premature, and to give an interpretation to subsequent expressions of the like kind.—But, *non constat* that it might not be written long after the undated promise by which the parties entered into a solemn engagement to marry. Verbal declarations similar in their imports to the contents of No. 2, might have passed, for it can hardly be conceived that such a paper could have passed, without many preliminary verbal declarations to the same effect. People do not write in that manner, till after they have talked together in the same style.—The post-mark on the letter, No. 4, is May the 30th, and this letter refers to what passed on the night after the paper, No. 2, bears date; in it, he says, "You are my wife, to retract is impossible and ever shall be; I have proved my legal right to protect you, which I have most fully established: nothing in this world shall break those ties." The letter, No. 5, has these expressions: "Remember you are mine: that God Almighty may preserve my wife is the prayer of her husband." No. 6. "It grieves me to suffer you five minutes from your husband; nothing can change my sentiments, independent even of those sacred ties which unite us.—Nothing ever can or should (if 'twere possible) annul them.—Put that confidence in me which your duty requires.—That God may ever preserve my wife, and inspire her with the purest love for her husband, is the first wish of her adoring ———." No. 8. "I have received letters from town which say that Lord Stair has heard of our marriage." No. 12. "Whatever money you want draw on me for without scruple." No. 13, dated May 29, 1805. "Situated as you are, nothing could strengthen the ties which unite us, therefore wish it not to be mentioned that you are my wife till it can be done without injury to ourselves. I insist upon a paper acknowledging yourself as my wife." No. 14, dated June 10, 1805. "Forward to me the paper I requested in my last, and acknowledge yourself my wife—that as we are not immortal, I may leave you, in trust of a friend, the small remains of what was once a tolerable fortune; you can't refuse on any legal grounds; do, my dearest wife, forward it." In No. 15, dated June 28, 1805, he says, "I would not give up the title of your sister's brother for any consideration. Don't deny yourself what you require, as I should not wish my wife to appear in any thing not consistent with her rank; I will arrange before my departure money matters, so as to give you every opportunity of gratifying your taste, or any other fancy." In the letter marked 14, he asks her permission to go abroad on account of the distress of his affairs. "Will you allow me to endeavour by a short absence to rectify these things? In asking your consent, I humbly conjure you, dearest love, to pardon me.—I solemnly assure you I will not be absent from you very long."—In another part of this letter he points out the period of four months as the probable duration of his absence.

Now it is impossible to say that the exhibits, No. 2 and 10, are at all weakened by the strong conjugal expressions contained in these letters.—Taken together they, in their plain and obvious meaning, import a recognition of an existing marriage. What is their technical meaning? That information we must obtain from the learned persons who have been examined.—Mr. Erskine, Mr. Hamilton, Mr. Cragie, Mr. Hume, and Mr. Ramsay, are all clearly of opinion that they are "present de-

clarations."—Mr. Cay is equally clear that they "are contracts *de presenti*."—Sir Ilay Campbell describes them as "*very explicit mutual declarations of marriage* between the parties."—Mr. Clerk says that No. 2. is evidence of a very high nature to prove that "a marriage had been contracted by the parties; it is a *full and explicit declaration* of a contract *de presenti*." "No. 10," he says, "imports little more than No. 2; it is *important evidence* to the same effect." Mr. Cathcart and Mr. Gillies, who hold a *copula* in all cases necessary, do not distinctly say under which class of cases the present falls.

Upon this view I think myself entitled to lay aside, at least for the present, the rules of law that apply to promises. The main enquiry will thus be limited to two questions, whether, by the law of Scotland, a present declaration *constitutes* or *evidences* a marriage *without a copula*; and secondly, whether, if it does not, the present evidence supplies sufficient proof that such a requisite has been complied with.

The determination of the first question must be taken from the authorities of that country, deciding for myself and for the parties entrusted to my care, as well as I can, upon their preponderance where they disagree, and feeling that hesitation of judgment which ought to accompany any opinion of mine upon points, which divide the opinions of persons so much better instructed, in all the learning which applies to them.

The authorities to which I shall have occasion to refer are of three classes; first, the opinions of learned professors given in the present or similar cases; secondly, the opinions of eminent writers as delivered in books of great legal credit and weight; and thirdly, the certified adjudication of the tribunals of Scotland upon these subjects. I need not say that the last class stands highest in point of authority; where private opinions, whether in books or writing, incline on one side, and public decisions on the other, it will be the undoubted duty of the Court, which has to weigh them, *stare decisis*.

Before I enter upon this examination I will premise an observation, 491. from which I deduce a rule that ought, in some degree, to conduct my judgment; the observation I mean, is this, that the Canon Law, as I before have described it to be, is the basis of the marriage law of Scotland, as it is of the marriage law of all Europe. And whether that law remains entire, or has been varied, I take it to be a safe conclusion, that, in all instances where it is not proved that the law of Scotland has resiled from it, the fair presumption is that it continues the same. Show the variation, and the Court must follow it; but if none is shown, then must the Court lean upon the doctrine of the ancient general law; for I do not find that Scotland set out upon any original plan of deserting the ancient matrimonial law of Europe, and of forming an entire new code upon principles hitherto unknown in the Christian world. It becomes of importance, therefore, to consider what is the ancient general law upon this subject, and, on this point, it is not necessary for me to restate, that by the ancient general law of Europe, a contract *per verba de presenti*, or a promise *per verba de futuro cum copula*, constituted a valid marriage without the intervention of a priest, till the time of the Council of Trent, the decrees of which Council were never received as of authority in Scotland.

It appears from the case of Younger, cited by Sir Thomas Craig, Lib. 2. di. 18. s. 19, that, in his time, the practice upon a contract *de præs-*
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sentis, was the same in Scotland as it continued to be in England till the period of the Marriage Act, viz. to compel the reluctant party to a public celebration as a matter of order. This was soon discontinued in Scotland, on account of the apparent incongruity of compelling a man to marry against his will, but with a solemn profession of love and affection to the party who compelled him. But though they discarded the process of compulsion for some such reason as this, which is stated by Mr. Hume, they might still consistently retain the principle, that a present consent constituted a valid marriage. Whether it was retained, is the question I have to examine, assuming first (as I have done) that if the contrary is not shown, it must so be presumed.

The evidence of opinions on this point, taken in this and similar cases, and under similar authority, stands thus:—Mr. Erskine, Mr. Cragie, Mr. Hamilton, Mr. Hume, and Mr. Ramsay, who have been examined upon the question at present before the Court, are all clear and decided in their opinions, that a declaration *per verba de præsenti* without a *copula* does, by the law of Scotland, constitute a valid marriage. I will not enter into an examination of their authorities where they agree—*Oportet discentem credere*, though, where authorities differ, it is a rule which cannot be universally applied. Still less shall I presume to discuss their reasonings, except in a few instances, where, however desirous to follow, I find a real inability to accompany them to their conclusions. To the authorities above stated, I must add the opinions of the learned persons examined upon the case of Beamish and Beamish; a case which came before this Court upon a similar question of a Scotch marriage of an Englishman with a Scotch woman in the year 1788, and in which the Court of Arches to which it was appealed, upon the informations of law obtained from the learned advocates of Scotland, pronounced for the validity of the marriage. Mr. John Millar, Professor of law at Glasgow, there said, “that, by the law of Scotland, the ceremony of being married by a clergyman was not necessary to constitute a valid marriage. The deliberate consent of parties, entering into an agreement to take one another for husband and wife, was sufficient to constitute a legal marriage, as valid in every respect as that which is celebrated in the presence of a clergyman.—Consent must be expressed or understood to be given *per verba de præsenti*; for consent *de futuro*, that is, a promise of marriage does not constitute actual marriage. By the Scotch law, the deliberate consent of parties constitutes marriage.” Mr. John Orr, in his deposition, said “By the laws of Scotland, a solemn acknowledgment of a marriage having happened between the parties, whether verbally, or in writing, is sufficient to constitute a marriage, whether expressed in *verbis de præsenti*, or in an acknowledgment that the marriage took place at a former period. A promise followed by a *copula* would constitute a valid marriage; and a written instrument containing not a consent *de præsenti*, but only stating that the parties were married at a certain time, or even a solemn verbal acknowledgment to this effect, although no actual marriage had taken place, is sufficient to constitute a marriage by the law of Scotland.”—Mr. Hume said, marriage is constituted by consent of parties to take or stand to each other in the relation of husband and wife.—The mode or form of consent is not material, but it must be *de præsenti*.” Mr. Erskine and Mr. Robertson agreed in saying, “that a deliberate acknowledgment of the parties that they were married, though not con-

taining a contract *per verba de præsenti*, is sufficient evidence of a marriage, without the necessity of proving the actual celebration." Mr. Clerk, Mr. Gillies, and Mr. Cathcart, who are examined in the present case on the part of Mr. Dalrymple, are equally clear in their opinions on the other side of the question. Mr. Cay inclines to think a *copula* necessary, although well aware that a different opinion prevails among lawyers on this point."

Sir Ilay Campbell's opinion upon this important point, which the Court was particularly eager to learn, is, through some inaccuracy of the examiner, transmitted in such a manner as to leave it rather a matter of question, which of the two opinions he favours; for in the former part of the deposition he is made to say, that "by the general principles of the law of Scotland, marriage is *perfected* by the mutual consent of parties accepting each other as husband and wife." In words so express and unqualified, pointing to nothing beyond the mutual acceptance of the parties, as *perfecting* a marriage without reference to any future act as necessary to be done, I thought I had received a judgment of high authority in favour of the ancient rule, that consent without a *concupitus* constitutes a marriage: but in a latter part of the deposition, he lays it down, that this acknowledgment *per verba de præsenti* must be attended with personal intercourse, prior or subsequent; if so, it throws a doubt upon the precise meaning of the former position, which had declared a marriage perfected by mere mutual acceptance. "Without such intercourse," Sir Ilay Campbell says, "they would resolve into mere *stipulatio sponsalitia*, where the words are *de præsenti*, but the effect future."—And here I have to lament the difficulty I find in following so highly respectable a guide to the conclusion, on account of a distinction that strongly impresses itself upon my apprehension. In the *stipulatio sponsalitia* the words *de præsenti* are qualified by the future words that follow, and which imply that something more is to be done—a public marriage to take place; but in the case supposed of a clear present declaration, no such qualifying expressions occur—nothing pointing to future acts as the fulfilment of a present engagement. I find the greater difficulty in ascertaining the decided judgment of this very eminent person, from considering an opinion of his given into the English Court of Chancery, Lib. Reg. A. 1780. F. 552, upon a requisition from that Court, and on which that Court acted in the case of the Scotch marriage. In that case, the case of the marriage of Thomas Thomasson, and Catharine Grierson, the opinion dated August 18th, 1781, and remaining on record in Chancery, states a present contract to be sufficient to validate a marriage, without any mention of a *copula*, antecedent, or subsequent; the known accuracy of his judgment would never have allowed him to omit this, if it had been considered by him at that time a necessary ingredient in the validity.—I might, perhaps, without much impropriety, be permitted to add another legal opinion of equal authority—the opinion of a person, whose death is justly lamented as one of the greatest misfortunes that have recently visited that country.—I need not mention the name of the Lord President Blair, upon whose deliberate advice and judgment this present suit has been asserted in argument, and without contradiction, to have been brought into this Court.

Upon this state of opinions, what is the duty of the Court? How am I to decide between conflicting authorities? For to decide I am bound.—Far removed from me be the presumption of weighing their compa-

rative credit; it is not for me to construct a scale of personal weight amongst living authorities, with most of whom I am acquainted no otherwise than by the degree of eminence which situation, and office, and public practice, and reputation, may have conferred upon them.—In such a case I am under the necessity of quitting the proper legal rule of estimating *pondere, non numero*; I am compelled to attend a little to the numerical majority (though I admit this to be a sort of *rusticum judicium*,) and finding that much the greater number of learned persons recognize a rule consonant to that which, in ancient times, governed the subject universally, I think I am not qualified to say, that as far as the weight of opinion goes, it is proved that the law of Scotland has innovated upon the ancient general rule of the marriage law of Europe. It appears to me, that the common mode of expression used in Scotland, which is constantly recurring, is no insignificant proof of the contrary doctrine. It is always expressed—Promise *cum copula*, the *copula* is in the ordinary phrase, a constant adjunct to the promise,—never to the *contract de presenti*, strongly marking the known distinction between the two cases, that the latter by itself worked its own effect, and that the other would be of no avail, unless accompanied with its constant and express associate.

I come now to the text authorities of the Scotch writers:—the first to whom I shall refer is (a) Craig. It does not appear to me, that he is of great authority either one way or the other: he admits generally that the question of marriage is not *hujus instituti propria, sed judicis ecclesiastici*, and the case of *Younger*, which he cites from the Court of Commissaries, is a case not of a declaration *de presenti*, but of a promise *cum copula*; unless, therefore, it is previously established, that a promise *cum copula* converts itself in all respects, and in all its bearings, into a contract *de presenti* without a *copula*, (which certainly it does in the Canon Law, and is so recognized in the majority of the opinions upon the law of Scotland,) it is no direct authority; and the conclusion is still more weakened, by observing, that, in that case, a judicial sentence of the Commissaries had been actually obtained, and that the point determined by the common law was a mere question of succession upon legitimation, which may depend upon many considerations extrinsic to the original validity of the marriage.

A more pertinent authority, and of higher consideration, is Lord Stair, an ancestor, I presume, of one of the present parties—a person whose learned labours have at all times engaged the reverence of Scotch jurisprudence. He treats of this very question, stating it as a *question*, and determines it thus: (b) “It is not every consent to the married state that makes matrimony, but consent *de presenti*, not a promise *de futuro matrimonio*.” The marriage consists not in “the promise but in the present consent, whereby they accept each other as husband and wife, whether by words expressly, or tacitly by marital cohabitation, or acknowledgment, or by natural commixtion where there hath been a promise preceding, for therein is presumed a conjugal consent *de presenti*, but the consent must specially relate to that conjunction of bodies as being then in the consenter’s capacity, otherwise it is void.” I shall decline entering into the distinctions and refinements which have at-

(a) Cragii jus feudale, lib. 2. dieg. 18. § 17 & 19.

(b) Stair’s Institut, lib. 1. tit. 4. § 6.

tempted to convert the obviously plain meaning of this passage into one of a very different import. It does appear to me to establish the opinion of this very learned person to be, that without a commixtion of bodies immediately following, (though in all cases to be looked to as possible, and at some time or other to take place,) a present valid marriage is constituted by a contract *de præsenti*.

Sir George Mackinsie, (a) Lord Advocate under King Charles and James the Second, whose authority carries with it a fair proportion of weight, says "Consent *de præsenti* is that in which marriage doth consist. Consent *de futuro* is a promise; this is not marriage, for either party may *Resile rebus integris*;" manifestly intimating that this could not be done under the consent *de præsenti*.

Another authority of more modern date, but entitled to the greatest respect, is Mr. Erskine, a writer of institutional law; by him it is expressly laid down (B. 1. tit. 6. § 5.) that "marriage consists in the present consent, whether that be by words expressly, or tacitly, by marital cohabitation, or by acknowledgment. Marriage may without doubt be *perfected* by the consent of parties declared by writing, provided the writing be so conceived as to import a present consent." Nothing upon the direct meaning of these words can be more clear, than that he held bodily conjunction not necessary in a present contract. The very note of the anonymous editor, to whom, as an anonymous editor, no authority can be allowed, whatever may be the weight that really belongs to it, admits this; for he says, "From the later decisions of the Court, there is reason to doubt, if it can *now* be held as a law, that the private declarations of parties, even in writing, are *per se* equivalent to actual celebration of marriage;" admitting, by that mode of expression, that such was the doctrine of the text and of the times when it was composed. Mr. Clerk says, "*he considers the doctrine to be incorrect*," thereby likewise admitting it to be the doctrine contained in these words.

I am not enabled to say how far Mr. Hutcheson's book can be considered as a work of authority. It, however, carries with it most respectable credentials, if it be true, what has been asserted in the argument, that it has been sanctioned by the approbation of several of the judges of Scotland, and particularly of Sir Ilay Campbell, who refers to it in his deposition as a book of credit, and under whose patronage it is published, and to whose perusal it is said to have been submitted previously to its publication. His statement of the law of Scotland is full and explicit in favour of the doctrine, that private mutual declarations require no bodily consummation to constitute a marriage. He says that the ancient principle to this effect has been *happily* retained in the law of Scotland, speaking with similar feelings of attachment to it, which are observable in our Swinburn, when he talks of the repealing statute of Edward VI. as *being worthily and for good reasons enacted*, though a regard to domestic security has induced us to extinguish it entirely in this part of the island by the legislative provisions of later times. Mr. Hutcheson mentions it as a fact, that in the case of M'Adam against Walker, *none of the judges, who dissented from the judgment, disputed that doctrine of the law*. His testimony to such a fact is equivalent to that of any person of unimpeached credit—even to that of Lord Stair or Mr. Erskine; he has asserted it in the face of his profession and the public,

(a) Mackinsie. Institut. book 1. tit. 6. § 3.

and at the hazard of being contradicted, if he has stated it untruly, by the united voice of the whole bench and bar of his country.

In support of the opposite opinion, no ancient writer of authority has been cited. The only writer named, is of very modern date, Lord Kaimes, a man of an ingenious and inquisitive turn of mind, and of elegant attainments, but whose disposition, as he admits, did not lead him to err on the side of excessive deference to authority and establishment. The very title of his book is sufficient to excite caution; "*Elucidations respecting the law of Scotland*" may seem to imply rather proposed improvements than expositions of the existing law. He says, in his preface, that "he brings into the work the sceptical spirit, wishing and hoping to excite it in others, and confesses that he had perhaps indulged it too much." But supposing that it is liable to no objection of this kind, the whole of his chapter on these subjects, so far as this question is concerned, relates entirely to the effect of a promise *de futuro cum copula*, which has no application to the present case; unless it is assumed, that this amounts to the same thing identically in law, to all intents and purposes, as a contract *de presenti*. I must add that his extreme inaccuracy, in what he ventures to state with respect to both the ancient Canon Law and to the modern English Law, tends not a little to shake the credit of his representations of all law whatever. In this chapter (page 32) he asserts that by the *present* law of England, a mutual promise of marriage *de futuro* is a good foundation to compel a refractory party to complete the marriage, by process in the Spiritual Court. I mean no disrespect to the memory of that ingenious person, when I say, that it is an extraordinary fact that it should have been a secret to any man of legal education in any part of this island, that the law of England has been directly the reverse for more than half a century.

No other reference to any known writer of eminence is produced; it is easy, therefore, to strike the balance upon this class of authorities; they are all in one scale, a very ponderous mass on one side, and totally unresisted on the other.

I come, thirdly, to the last and highest class of authorities, that of cases decided in the Scotch tribunals.—Many of these have been alluded to in the learned expositions which have been quoted, but such of them (and they are not few in number) as apply to the cases of promises *de futuro cum copula* I dismiss for the present, observing only, that if a promise of this kind be equivalent to a contract *de presenti nudis finibus*, the result of those cases appears to me strongly to incline to the conclusion deduced from the two former classes of authority.

With regard to decided cases I must observe, generally, that very few are to be found, in any administration of law in any country, upon acknowledged and settled rules. Such rules are not controverted by litigation, they are therefore not evidenced by direct decision: they are found in the maxims and rules of books of text law. It would be difficult, for instance, to find an English case in which it was directly decided, that the heir takes the real, and the executor the personal estate; yet though nothing can be more certain, it is only incidentally, and *obiter*, that such a matter can force itself upon any recorded observation of a Court; equally difficult would it be to find a litigated case in the Canon Law, establishing the doctrine, that a contract *per verba de presenti* is a present marriage, though none is more deeply radicated in that law.

The case of *Cochrane versus Edmonston*, before the Court of Session in the year 1804, was a case of contract *de præsenti*, and of this I shall take the account given by Mr. Clerk. The Court there held, that a written acknowledgment *de præsenti* was sufficient to constitute a marriage. The interlocutor of the Lord Ordinary, which the Court adhered to, rests upon the consent of parties to constitute a marriage *de præsenti* without referring to the copula." Mr. Clerk says, "he cannot suppose the Court overlooked the very material circumstance of the *copula*," which did exist in that case, and which he says, "would have been sufficient with a bare promise to bind the man to marriage."—I find great difficulty in acceding to this observation, particularly when it is stated that the Court adhered to the interlocutor, which expressed the directly contrary doctrine, and even if it had not so done, it appears to me to be an inaccuracy too striking to attribute to that Court, that they should have declared consent *de præsenti* sufficient, without express mention of the *copula*, if they had thought it a necessary ingredient in the validity of the marriage. What Mr. Clerk says of his disposition to advise an appeal, in particular cases, is not necessary to be noticed in the present consideration, which regards only actual decisions, and not private opinions, however respectable. He admits expressly, that on the evidence of the report, he thinks it at least highly probable, that some such doctrine, as that held by Mr. Erskine, was laid down in that case by the Judges.

The next case which I shall mention is that of *Taylor and Kello*, which occurred in 1786. This was an action of declarator of marriage instituted by Patrick Taylor against Agnes Kello, and was grounded on a written acknowledgment in the following words: "I hereby declare you, Patrick Taylor, in Birkenshaw, my just and lawful husband, and remain your affectionate wife, Agnes Kello." Kello delivered this written declaration to Taylor, and received from him another *mutatis mutandis* in the same terms, which she afterwards destroyed. There was no sufficient evidence to support the *concubitus*, but the Report states, that *the Court, in its decision, held this to be out of the question*. The Commissaries "found the mutual obligations relevant to infer marriage between the parties, and found them married persons accordingly." This sentence was affirmed by the Court of Session, though that Court was much divided upon the occasion, some of the Judges considering the declaration as merely intended to signify a willingness to enter into a regular marriage; but a majority of the Court thought, in conformity to the judgment of the Commissaries, that the marriage was sufficiently established. This sentence was reversed by the House of Lords, but upon the express grounds that neither of the parties understood the papers respectively signed by them to contain a final agreement to consider themselves as married persons; on the contrary it was agreed that the writing was to be delivered up whenever it was demanded: The whole subsequent conduct of the parties proving this sort of agreement.

It appears then that this was not considered by the House of Lords an *irrevocable* contract, such as that of marriage is in its own nature, from which the parties cannot resile even by joint consent, much less on the demand of one party only. This case, I think, goes strongly to affirm the doctrine, that an *irrevocable contract de præsenti* does of itself constitute a legally valid marriage. Mr. Cathcart admits, in his

deposition, that this sentence of the Commissaries, confirmed by the Court of Session, would have been a decision in favour of the doctrine, that a contract *de præsenti* constitutes a marriage, if it had not been reversed by the House of Lords. But as it was clearly reversed upon other grounds, the authority of the two Courts stands entire in favour of the doctrine. Mr. Gillies thinks the reversal hostile to the doctrine, but he has not favoured the Court with the grounds on which he entertains this opinion. Mr. Clerk contents himself with saying, that the doctrine is not recognised: most assuredly, it is not disclaimed; on the contrary, the presumption is, that if the contract had been considered *irrevocable*, the House of Lords would have attributed to it a very different effect.

In the case of *Inglis* against *Robertson*, which was decided in the same year, the Commissaries sustained a marriage upon a contract *de præsenti*, and this sentence was affirmed by the Court of Session upon appeal, and afterwards by the House of Lords. The accounts vary with respect to the proof of *concubitus* in this case, which renders it doubtful whether the decision was grounded on the acknowledgment only, or referred likewise to the *copula*. If it had no such reference, then it is a case directly in point: but if it had, it certainly cannot be insisted upon as authority upon the present question.

The case of *Ritchie* and *Wallace*, which was before the Court of Session in 1792, is not reported in any of the books, but is quoted by Mr. Hamilton, who was of counsel in the cause. It was the case of *a written declaration of an existing marriage, but accompanied with a promise that it should be celebrated in the church at some future and convenient time*. This very circumstance of a provision for a future public celebration might of itself have raised the question, in the minds of some Judges, whether these acknowledgments could be considered as relating to a matrimonial contract already formed and perfected in the contemplation of the parties themselves; and this is sufficient to account for the diversity of opinion of the Judges upon the case, without resorting to any supposed difference of opinion on the general principle of law now controverted. The woman was pregnant by the man when she received this written declaration from him, but, as I understand the case, nothing rested in judgment upon this fact; for Mr. Hamilton says, the woman *founded on the written acknowledgment* as a *declaration de præsenti* constituting a marriage, which conclusion of law was controverted by the man; but the Court, by a majority of six Judges to three, found the *acknowledgment libelled, relevant to infer the marriage*.

Bis. on
h. v. D.
158. The case of *M'Adam* against *Walker* (13th of November 1806,) which underwent very full discussion, is by all parties admitted to be a direct decision upon the point, though it was certainly attended with some difference of opinion amongst the judges by whom it was decided. In that case Elizabeth Walker had cohabited with Mr. M'Adam, and borne him two daughters. In the presence of several of his servants, whom he had called into the room for the purpose of witnessing the transaction, he desired Elizabeth Walker to stand up and give him her hand; and she having done so, he said, "This is my lawful wife, and these my lawful children." On the same day, 'without having been alone with Walker during the interval, he put a period to his existence. The Court held the children to be legitimate. It appears clearly that,

in this case, there had been a *copula* antecedent, though none could have taken place subsequent to the declaration: It could not therefore have been upon the ground of want of *copula* that Sir Ilay Campbell, who holds a prior *copula* as good as a subsequent one, joined the minority in resisting that judgment. It is stated by Mr. Hutcheson, as a matter of fact, that "none of the Judges disputed the law," but there were other grounds of dissent arising out of the circumstances of the case, unconnected with the legal question. "The Judges entertained doubts of the sanity of Mr. M'Adam at the time of the marriage; they considered also, that when he made the declaration he had formed the resolution of suicide, and therefore did not mean to live with the woman as his wife." It is said that this decision of the Court of Session is appealed from, and therefore cannot be held conclusive upon the point. At any rate it expresses the judgment of that Court upon the principle, and the appeal, whatever the ground of it may be, does not shake the respect which I owe to that authority whilst it exists unshaken.

I might here call in aid the numerous cases where promise *cum copula* has been admitted to constitute a marriage, if the rule of the Canon Law, transfused into the law of Scotland, be sound, that *copula* converts a promise *de futuro* into a contract *de præsenti*. If it does not, if *copula* is required in a contract *de præsenti*, what intelligible difference is there between the two—between a promise *de futuro* and a contract *de præsenti*?—None whatever. They stand exactly upon the same footing.—A proposition, I will venture to say, never heard of in the world, except where positive regulation has so placed them, till these recent controversies respecting the state of the marriage law of Scotland.

I might also advert to the marriages at Gretna Green, where the blacksmith supplies the place of the priest or the magistrate. The validity of these marriages has been affirmed in England upon the certificates of Scotch law, without reference to any act of consummation, for such I think was clearly the exposition of the law as contained in the opinion of Sir Ilay Campbell, upon which the English Court of Chancery founded its decision in the case of *Grierson and Grierson*.

What are the cases which have been produced in contradiction to this doctrine?—As far as I can judge, none,—except cases similar to those which have been already stated, where the superior Court has overruled the decisions of the Court below, and pronounced against the marriage, upon grounds which leave the principle perfectly untouched.—The case of *M'Lauchlan contra Dobson*, in December 1796, was a case of contract *per verba de præsenti* where there was no *copula*, in which the Commissaries declared for the validity of the marriage, and the interlocutor was altered by the Court of Session. But upon what grounds was that sentence reversed? Mr. Hutcheson states, that "the Court did not think there was sufficient evidence of a real *de præsenti* matrimonial consent." Mr. Hume says, "the conduct of the parties had been variable and contradictory;" and Sir Ilay Campbell says, "there were circumstances tending to show that the parties did not truly mean to live together." The dicta of Lord Justice Clerk M'Queen have been quoted and much relied upon; but I must observe, that they come before the Court in a way that does not entitle them to much judicial weight: they are stated by Mr. Clerk to be found in notes of the handwriting of Mr. Henry Erskine, who is not himself examined for the purpose of au-

thenticating them, although interrogatories are addressed to other persons with respect to other legal authorities, for which they are much less answerable. They are taken very briefly, without any context, nor is it stated in what manner, whether in the form of discussion or decision, they fell from that learned Judge. He is, however, made to say, "The case of M'Lauchlan against Dobson is new, but the law is old and settled. Two facts admitted *hinc inde*, no celebration, no *concubitus*, nor promise of marriage followed by *copula*; contract as to land not binding till regularly executed, unless where *res non sunt integræ*." This proposition, that "contract as to land not binding till regularly executed," proves little, because it may refer to rules that are confined to agreements respecting that species of property, and even with regard to that species of property the contract may be sufficiently executed by the signing of articles or deeds, though there is no entry upon the land. "A promise without *copula locus pœnitentiæ*—even verbal consent *de præsenti* admits *pœnitentia*,"—that is the matter to be proved. "Form of contracts contains express obligation to celebrate; till that done either party may resile." The reason is that these same forms contain words which qualify the present engagement by giving them a mere promissory effect. "Private consent is not the *consensus* the law looks to. It must be before a priest or *something equivalent*; they must take the oath of God to each other;" this may be done in private to each other, as it actually was done in the case of Lord Fitzmaurice: "a present consent not followed by any thing may be mutually given up, but if so, it cannot be a marriage." To be sure if the propositions contained in these dicta are correct, if it be true that a contract *de præsenti* may be mutually given up, then certainly it cannot constitute a marriage; but that is the very question which is now to be determined upon the comparative weight of authorities; I admit the authority of Lord Braxfield, deliberately and directly applied to any proposition to which his mind was addressed, to be entitled to the highest respect; but I have already adverted to the loose manner in which these dicta are attributable to him, and it is certainly a pretty strong circumstance against giving full effect to these dicta so introduced, without context and without authentication, that Lord Braxfield, as Lord Ordinary, refused the Bill of Advocation in the case of Taylor and Kello complaining of the sentence of the Consistorial Court, which found "mutual obligations relevant to infer a marriage."

The other case that has been mentioned, is that of *M'Innes against More*, which came before the House of Lords upon appeal in the year 1782. The facts therein were, that the man, at the woman's desire, had signed the acknowledgment not for the purpose of making a marriage, but merely as a colour to serve another and different purpose mutually concerted between them, namely, that of preventing the disgrace arising from the pregnancy of the woman. The Commissaries and the Court of Session had found the facts relevant to infer a marriage, but the House of Lords, considering the transaction as a mere blind upon the world, and that no alteration of the *status personarum* was ever intended by the parties themselves, reversed the sentence, and pronounced against the marriage.

I am not aware of any other decided cases which have been produced against the proposition, that a contract *de præsenti* (be it in the way of *declaration* or *acknowledgment*) *constitutes*, or, if you will, *evidences* a marriage. It strikes me, upon viewing these cases, that such of them

as are decided in the affirmative, have been adjudged directly upon this *principle*, and that where they have been otherwise determined, it turns out that they have rested upon *specialties*, upon circumstances which take them out of the common principle, and produce a determination that they do not come within it. If they do not go directly to the extent of affirming the principle, they at least imply a recognition of it, a sort of tacit assent and submission to its authority, an acknowledgment of its being so deeply intrenched in the law, as not to be assailable in any general and direct mode of attack. The exceptions prove the rule to a certain degree. It was proved in all those cases where there was a judgment apparently contradictory, that in truth they were not real matrimonial contracts *de presenti*. The effect was not attributed to them, because they were not considered as such contracts. I cannot but think, that when case upon case came before the House of Lords, in which that principle was constantly brought before their eyes, they would have reprobated it as vicious if they had deemed it so, instead of resorting to circumstances to prove that the principle could not be applied to them. I may, without impropriety, add, that the Lord Chancellors of England have always, as I am credibly informed, in stating their understanding of Scotch law upon such subjects to the House of Lords, particularly Lord Thurlow, been anxious to hold out that law to be strictly conformable to the canonical principles, and have scrupulously guarded the expressions of the public judgments of the House, against the possible imputation of admitting any contrary doctrine.

Upon the whole view of the evidence applying to this point, looking first to the rule of the general matrimonial law of Europe,—to the principle which I venture to assume, that such continues to be the rule of Scotch matrimonial law, where it is not shown that that law has actually reiled from it,—to the opinions of eminent professors of that law,—to the authority of text writers, and to the still higher authority of decided cases (even without calling in aid all those cases which apply a similar rule to a promise *cum copula*) I think that being compelled to pronounce a judgment upon this point, I am bound to say, that I entertain as confident an opinion as it becomes me to do, that the rule of the law of Scotland remains unshaken; that the contract *de presenti* does not require consummation in order to become “very matrimony:” that it does, *ipso facto, et ipso jure*, constitute the relation of man and wife. There are learned and ingenious persons in that country, who appear to think this rule too lax, and to wish to bring it somewhat nearer to the rule which England has adopted; but on the best judgment which I can form upon the subject, it is an attempt against the general stream of the law, which seems to run in a direction totally different, and is not to be diverted from its course by efforts so applied. If it be fit that the law of Scotland should receive an alteration, of which that country itself is the best judge, it is fit that it should receive that alteration in a different mode than that of mere interpretation.

When I speak of a contract, I mean of course one that is attended with such qualifications as the law of Scotland requires for such a contract, and which in truth appear to me to be very little more than what all law requires for all contracts of every description, and without which an apparent contract upon any subject is, in truth, no contract at all; for having been led, by the manner in which these qualifications are sometimes described, to suppose at first, that they were of a *peculiar and*

62,6. characteristic nature, I really cannot, upon consideration, discover in them any thing more than the *ordinary* qualifications requisite in all contracts. It is said that the marriage contract must *not be extorted by force or fraud*. Is it not the general law of contracts, that they are vitiated by proof of either? In the present case, *menace* and *terror* are pleaded in Mr. Dalrymple's allegation as to the execution of the first contract No. 2, for as to the *promise* No. 1, he admits that it was given *merely at the entreaties and instigation of the lady*, (an admission not very consistent with the suggestion of the terror afterwards applied), but he asserts that he executed this contract, "being absent from his regiment, without leave, alone with her, and unknown to her father, and urged by her threats of calling him in."—What was to be the effect of calling in the father, which produced so powerful an impression of terror in his mind, he does not explain; still less does he attempt to prove the *fact*, for he has not read the only evidence that could apply to it, the sworn answers of the lady to this statement of a transaction passing secretly between themselves, and in which answers it is positively denied. This averment of menace and terror is perfectly inconsistent with every thing that follows; with the reiterated declarations contained in No. 10, and with the letters which he continued to write in the same style for a year afterwards. Could the paper No. 10. have been executed by a man smarting under the atrocious injury of having been compelled by *menaces* to execute one of the like import? Could these letters, breathing sentiments of unalterable fondness, have been addressed to the person by whom he had been so treated? Nothing can be apparently more unfounded than this suggestion of menace and terror. It is said that it must be a *deliberate* contract. It is, I presume, implied in all contracts, that the parties have taken that time for consideration which they thought necessary, be that time more or less, for no where is there assigned a particular *tempus deliberandi* for the marriage contract, any more than for any other contract.

It is said that it must be *serious*, so surely must be all contracts; they must not be the sports of an idle hour, mere matters of pleasantry and badinage, never intended by the parties to have any serious effect whatever; at the same time it is to be presumed, that serious expressions, applied to contracts of so serious a nature as the disposal of a man or woman for life, have a serious import. It is not to be presumed, *a priori*, that a man is sporting with such dangerous play-things as marriage engagements. Again it is said that the *animus contrahentium* must be regarded: Is that peculiar to the marriage contract? It is in the intention of the parties that the substance of every species of contract subsists, and what is beyond or adverse to their intent does not belong to the contract. But then that intention is to be collected (primarily at least) from the words in which it is expressed; and in some systems of law, as in our own, it is pretty exclusively so to be collected. You are not to travel out of the intention expressed by the words, to substitute an intention totally different and possibly inconsistent with the words. By the matrimonial law of Scotland a latitude is allowed, which to us (if we had any right to exercise a judgment of the institutions of other countries with which they are well satisfied) might appear somewhat hazardous, of substituting another serious intention than that which the words express, to be proved by evidence extrinsic, and totally, as we phrase it, *dehors* the instrument. This latitude is indulged in Scotland

to a very great degree indeed, according to Mr. Erskine. In all other countries a solemn marriage in *facie Ecclesiæ facit fidem*; the parties are concluded to mean seriously, and deliberately, and intentionally, what they have avowed in the presence of God and man, under all the sanctions of religion and of law; not so in Scotland, where all this may pass, as Mr. Erskine relates, and yet the parties are at liberty to show, that by virtue of a private understanding between themselves, all this is mere imposition and mockery, without being entitled to any effect whatever.

But be the law so, still it lies upon the party, who impeaches the intention expressed by the words, to answer two demands which the law, I conceive, must be presumed to make upon him; first, he must assign and prove some other intention; and secondly, he must also prove that the intention so alleged by him, was fully understood by the other party to the contract, at the time it was entered into: For surely it cannot be represented as the law of any civilized country, that in such a transaction a man shall use serious words, expressive of serious intentions, and shall yet be afterwards at liberty to aver a private intention, reserved in his own breast, to avoid a contract which was differently understood by the party with whom he contracted. I presume, therefore, that what is said by Mr. Craigie can have no such meaning, "that if there is reason to conclude, from the expressions used, that both or *either* of the parties did not understand that they were truly man and wife, it would enter into the question whether married or not," because this would open a door to frauds, which the justice, and humanity, and policy of all law must be anxious to keep shut. In the present case no other *animus* is set up and endeavoured to be substituted, but the *animus* of avoiding danger, on which I have already observed. The assignment of that intent does almost necessarily exclude any other, and indeed no other is assigned; and as to any plea that it was differently understood by Miss Gordon, the other party in this cause, no such is offered, much less is any proof to that effect produced, unless it can be extracted from the letters.

Do they qualify the express contracts, and show a different intention or understanding? It has been argued that they contain some expressions which point to apprehensions, entertained by Miss Gordon, that Mr. Dalrymple would renege from the obligations of the contract, and others that are intended to calm those apprehensions by promises of eternal fidelity, both which it is said are inconsistent with the supposition that they had knowingly constituted themselves husband and wife, and created obligations *de præsenti*, from which neither of them could renege.

In the first place, is there this real inconsistency? Do the records of this Court furnish no such instance as that of the desertion of a wife by her husband? And is such an occurrence so entirely out of all reasonable apprehension in a case like the present? Here is a young gentleman, a soldier, likely to be removed into a country in which very different ideas of marriage prevail, amongst friends who would discountenance this connexion, and amongst numerous objects which might divert his affections, and induce him to repent of the step he had taken in a season of very early youth, and in a fit of transient fondness: That a wife left in that country exposed to the chances of a change in his affections,—to the effect of a long separation,—to the disapprobation of his

friends,—to the impressions likely to be made by other objects upon a young and unsettled mind, should anticipate some degree of danger is surely not unnatural; equally natural is it, that he should endeavour to remove them by these renewed professions of constancy. But supposing that Miss Gordon really did entertain doubts with respect to the validity of her marriage, what could be the effect of such doubts? Surely not to annul the marriage, if it were otherwise unimpeached. We are, *at this moment*, enquiring with all the assistance of the learned professors of law in that country, amongst whom there is a great discordance of opinion, what is the effect of such contracts. That private persons, compelled to the necessity of a secret marriage, might entertain doubts whether they had satisfied the demands of a law which has been rendered so doubtful, will not affect the real sufficiency of the measures they had taken. Mr. Dalrymple might himself entertain honest doubts upon this point; but if he felt no doubt of *his own meaning*, if it was his intention to bind himself *so far as by law he could*, that is enough to sustain the contract; for it is not his uninformed opinion of law, but his real intention that is to be regarded. A *public* marriage was impracticable, he does all that he can to effect a marriage, which was *clandestine*, not only at the time, but which was intended so to continue. The language is clear and unambiguous in the expression of intent. No other intention is assigned; and it is not such expressions as these, arising naturally out of the feelings which must accompany such a transaction, that can at all affect its validity.

The same observations apply to the expressions contained in the later letters written to Mr. Hawkins. In one of them she says, "My idea is, that he is not aware how binding his engagements are with me," and possibly he might not. Still if he meant at the time to contract *so far by law as he could*, no doubts which accompanied the transaction, and still less any which followed it, can at all alter its real nature and effect. Miss Gordon had likewise her later hours of doubt, and even of despondency; "you will never see me Mrs. Dalrymple," she says, in the spring of 1807, to her sister; and when it is considered what difficulties she had to encounter, at what an immense distance she then stood from the legal establishment of her claims, having lost her hold upon his affections, it cannot be matter of great surprise, if in the view of a prospect so remote and cloudy, some expression of dismay and even of despair, should occasionally betray the discomposure of her mind. As to what she observes upon the alternative suggested by some friend, of a large sum of money in lieu of her rights (a proposition which she indignantly rejects) it seems to point rather to a corrupt purchase of her silence, than to any idea existing in her mind of a claim of damages, by way of a legal *solamen*, for the breach of a mere promissory contract.

The declarations, therefore, not being impeached by any of those disqualifications by which, in the law of Scotland, a contradictor is permitted to redargue and overcome the presumption arising from the production of such instruments, they become, in this stage of the matter, *præsumptiones juris et de jure* that found an instant conclusion of marriage, if I am right in the position that carnal copulation is not absolutely required to its completion. The fact that these papers were left in her single possession is insignificant, for it has well been observed by Dr. Barnaby, that it is not mutuality of *possession*, but mutuality of *intention*, that is requisite. It is much more natural that they should be left

in the possession of the lady, she being the party whose safety is the more special object of protection, but there is no proof here, that Mr. Dalrymple himself is not possessed of a similar document. He anxiously requested to have one, and the non-production of it by him furnishes no conclusive proof that he did not obtain his request. If he did not, it may have been an act of imprudence, that he confided the proofs of his marriage entirely to the honour of the lady; but if he did, it is perfectly clear that she has not betrayed the trust.

But I will now suppose that this principal position is wrong: that it is either extracted from erroneous authorities, or erroneously extracted from authorities that are correct. I will proceed then to inquire what proof there is of carnal copulation having taken place between the parties; and, upon this point, I shall content myself with such evidence as the general law requires for establishing such a fact: for I find no reference to any authority to prove that the law of Scotland is more rigid in its demand, where the fact is to be established in support of a marriage, than for any other purpose. It may have happened that the fact of carnal copulation has been established by a pregnancy, or some other evidence of as satisfactory a kind, in the few cases which have been transmitted to us, but I find no such exclusive rule as that which has been ingeniously contended for by Dr. Edwards; and I take it as an incontrovertible position, that the circumstances, which would be sufficient to prove intercourse in any other case, would be equally sufficient in this case. I do not charge myself in so doing, with going farther than the Scotch Courts would do, and would be bound to do, attending to the established rules of evidence.

In the first place I think it is most strongly to be inferred from the paper, No. 2, that some intercourse of a conjugal nature passed between these parties. Miss Gordon therein says, "I hereby promise that nothing but the greatest necessity, (necessity which ——— situation alone can justify), shall ever force me to declare this marriage." Now what other possible explanation can be given of this passage, or how can it be otherwise understood than as referring to the consequences which might follow from such an intercourse? I confess that I find myself at a loss to know how the blank can be otherwise filled up, than by a supposition of consequences which would speak for themselves, and compel a disclosure.

I observe that Mr. Dalrymple denies, in his allegation, that any intercourse took place *after* the date of the written declarations, which leaves it still open to the possibility of intercourse *before* that time, though he certainly was not called upon to negative a preceding intercourse, in consequence of any assertion in the libel which he was bound to combat. It will, I think, be proper to consider the state of mind and conduct of the parties relatively to each other at this time. Preliminary verbal declarations of mutual attachment must at least have passed (as I have already observed) before the promise contained in No. 1 was written, at whatever time that paper was written. In the first letter, which bears the post-mark of the 27th of May, whether relying on this paper if it then existed, or on declarations which had verbally passed between them, he thinks himself entitled to address her as his wife in the most endearing terms. On the following day, the 28th, the instrument which has been produced is signed, by which they mutually acknowledge each other as husband and wife. Letters continue to pass

between them daily, and sometimes more than once in a day, expressive of the most ardent and eager affection on his part, which can leave no room for the slightest doubt that he was, at that time, most devotedly attached to her person, and desirous of the pleasures connected with the enjoyment of it, in some way or other; for to what other motive can be ascribed such a series and style of letters from a young man, writing voluntarily, without any appearance of idle pleasantries, and with every character of a sincere pursuit, whether honourable or otherwise. What was the state of mind and conduct of the lady during this period of time? It is not to be presumed, from the contents of his letters, that she was either indifferent or repulsive.

The imputation indeed, which has been thrown upon her, is of a very different kind, that she was an acute and active female, who with a knowledge of the law of the country, which Mr. Dalrymple did not possess, was endeavouring *quacunqve via data*, to engage him in a marriage. To this marriage she has inflexibly adhered, and now stands upon it before this Court; so that whatever might be the real state of her affections towards this gentleman, (which can be known only by herself) this at least must be granted, that she was most sincerely desirous of this marriage connection, which marriage connection, both of them perfectly well knew, could not be publicly and regularly obtained. Taking then into consideration these dispositions of the parties, *his* desire to obtain the enjoyment of her person on the one hand, and *her* solicitude to obtain a marriage on the other, which after the delivery of such instruments she knew might at all events be effectually and honourably obtained by the mere surrender of her person, what is the probable consequence? In this part of the island the same circumstances would not induce the probability of a *private surrender*, because a *public ceremony* being here indispensibly required, no young woman, acting with regard to virtue, and character, and common prudence, would surrender her person in a way which would not only not constitute a marriage, but would, in all probability, defeat all expectation of such an event.

In Scotland the case is very different, because, in that country, if there are circumstances which require the marriage to be kept secret, the woman, after such private declarations past, carries her virgin honours to the private nuptial bed, with as much purity of mind and of person, with as little violation of delicacy, and with as little loss of reputation, as if the matter was graced with all the sanctities of religion. It is in vain to talk of criminality, and of grossness, and of gross ideas. In such a case there are no other ideas excited than such as belong to matrimonial intercourse. It is the "bed undefiled" according to the notions of that country: it is the actual *ceremony* as well as the *substance* of the marriage: it is the conversion of the lover into the husband: *transit in matrimonium*, if it was not *matrimonium* before. A most forcible presumption therefore arises that parties so situated would, for the purpose of a secret marriage, resort to such a mode of effecting it, if opportunities offered; it must almost, I think, be presumed, that Mr. Dalrymple was in that state of incapacity to enter into such a contract, which Lord Stair alludes to, if he took no advantage of such opportunities; for nothing but the want of opportunity can repel such a presumption.

Now how does the evidence stand with respect to the opportunity of effecting such a purpose? The connection lasted during the whole of

Mr. Dalrymple's stay in Scotland, and was carried on, not only by letters couched in the most passionate terms, but as admitted (and indeed it could not be denied), by nocturnal private visits, frequently repeated, both at Edinburgh, and at Braid, the country-seat of Mr. Gordon, in the neighbourhood of that city. Upon this part of the case six witnesses have been examined, who lived as servants in the family of Mr. Gordon. Grizell Lyall, whose principal business it was to attend on Miss Charlotte Gordon, one of the sisters, but who occasionally waited on Miss Gordon, says, "that Captain Dalrymple used to visit in Mr. Gordon's family in the spring of 1804; that before the family left Edinburgh she admitted Captain Dalrymple into the house by the front door, by the special order of Miss Gordon, in the evenings; that Miss Gordon's directions to her were, that when she rung her bell once, to come up to her in her bed-room, or the dressing-room off it, when she got orders to open the street door to let in Captain Dalrymple; or when she (Miss Gordon) rung her bell twice, that she should thereupon, without coming up to her, open the street door for the same purpose; that agreeably to these directions she frequently let Capt. Dalrymple into the house about nine, ten, or eleven o'clock at night, without his ever ringing the bell, or using the knocker; that the first time he came in this way, she showed him up stairs to the dressing-room off the young ladies' bed-room, where Miss Gordon then was, but that afterwards upon her opening the door, he went straight up stairs, without speaking, or being shown up; but how long he continued up stairs, she does not know, as she never saw him go out of the house; that the dressing-room above alluded to, was on the floor above the drawing room, and adjoining to the bed-room, where the three young ladies slept, and next to the ladies' bed-chamber was another room, in which there was a bedstead, with a bed and blankets, but no curtains or sheets to the bed, and it was considered as a lumber room, the key of which was kept by Miss Gordon." She says that she recollects, and it is a fact in which she is confirmed by another witness, Robertson, "that the family removed from Edinburgh to Braid that year, 1804, on the evening before a King's Fast," (the King's Fast Day for that year was on the 7th of June), "and on a Wednesday as she thinks, as the Fast Days are generally held on a Thursday; that at this time Miss Charlotte was at North Berwick, on a visit to Lady Dalrymple; that Mr. Gordon and Miss Mary went to Braid in the evening, but Miss Gordon remained in town, as she Lyall also did, and Mr. Robertson the butler, and one or two more of the servants."

It appears from the testimony of other witnesses, that Mr. Gordon her father, appeared much dissatisfied that this lady did not accompany himself and her sister to Braid, but chose to stay in town upon that occasion. There are passages in Mr. Dalrymple's letters which point to the necessity of her continuance in town, as affording more convenient opportunities for their meeting. Lyall states, that she recollects admitting Captain Dalrymple that evening, as she thinks, sometime between ten and twelve o'clock, and he went up stairs to Miss Gordon without speaking; that on the next morning she went up as usual to Miss Gordon's bed-room about nine o'clock and informed her of the hour; and having immediately gone down stairs, Miss Gordon rung her bell some time after, and on the deponent going up to her, she met her, either at the

bed-room door or at the top of the stairs, and desired her to look if the street door was locked or unlocked; and the deponent having examined, informed her that it was unlocked, and immediately after went into the dressing-room, and, after being a very short time in it, she heard the street door shut with more than ordinary force, which having attracted her notice, she opened the window of the dressing-room which is to the street, and on looking out she observed Capt. Dalrymple walking eastwards from Mr. Gordon's house; that from this she suspected that Captain Dalrymple was the person who had gone out of the house just before; that nobody could have come in by the said door without being admitted by some person within, as the door did not open from without, and she heard of no person having been let into the house on this occasion; that having gone down stairs after this, Mr. Robertson, the butler, observed to her, *that there had been company up stairs last night*; but she did not mention to him any thing of her having let in Capt. Dalrymple the night before, or of her suspicions of his having just before gone out of the house, at least she is not certain, but she recollects that he desired her to remember the particular day on which this happened."—Now from this account given by Lyall, the Counsel have attempted to raise a doubt, whether it was Mr. Dalrymple who went out, for it is said that he would have cautiously avoided making a noise for fear of exciting attention. But the account Lyall gives is exactly confirmed by Robertson, who deposes, "that on the 7th of June, which was the King's Fast, as he was employed about ten o'clock in the morning in laying up some china in his pantry, which is immediately off the lobby, he observed Captain Dalrymple come down stairs, and passing through the lobby to the front door, unlock it, and go out and shut the door after him." Some observations have been made with respect to Robertson's conduct, and he has been called a forward witness, because he made a memorandum of this circumstance at the time it occurred; but I think his conduct by no means unnatural. Here was a circumstance of mysterious intercourse that attracted the attention of several of the servants, and it is not at all surprising that this man, who held a superior situation amongst them in Mr. Gordon's family, and who appears to be an intelligent, well educated, and observing person, as many of the lower order of persons in that country are, should think it right, in the zeal he felt for the honour of his master's family, to make a record of such an occurrence. In so doing, I do not think that he has done any thing more than is consistent with the character of a very honest and understanding servant, who might foresee that such a record might one day or other have its use. The witness Lyall goes on to say, that Miss Gordon and herself went to Braid that day (being the King's Fast) before dinner, and that on that evening, or a night or two after, she was desired by Miss Gordon to open the window of the breakfasting parlour to let Captain Dalrymple in, and she did so accordingly, and found Captain Dalrymple at the outside of the window when she came to open it, and this she thinks might be between ten and twelve o'clock, and she showed him up stairs, when they were met by Miss Gordon at the door of her bed-chamber, when they two went into said chamber, and she returned down stairs; that she does not know how long Captain Dalrymple remained there with Miss Gordon, or when he went away;" she states that "Miss Charlotte returned from her visit at

North Berwick a few days after Miss Gordon and deponent went to Braid; that at Braid Miss Gordon and Miss Charlotte slept in one room, and Miss Mary in another; that within Miss Gordon and Miss Charlotte's bed chamber there was a dressing-room, the key of which Miss Gordon kept; and she recollects one day getting the key of it from Miss Gordon to bring her a muff and tippet out of it, and upon going in she was surprised to find in it a feather-bed lying upon the floor, without either blankets or sheets upon it, so far as she recollects: that it struck her the more, as she had frequently been in that room before without seeing any bed in it; and as Miss Gordon kept the key, she imagined she must have put it there herself; that she found this bed had been taken from the bed-chamber in which Miss Mary slept, it being a double bedded room; that when she observed the said bed in the dressing room, it was during the time that Captain Dalrymple was paying his evening visits at Braid; that upon none of the occasions that she let Captain Dalrymple into Braid House did she see him leave it, nor did she know when he departed." Three other witnesses, Robertson and the two Gardeners, have been examined upon this part of the case, and they all prove that Mr. Dalrymple was seen going into the house in the night, or coming out of it in the morning.

It is proved likewise that Porteous, one of the servants, was alarmed very much, that the window of the room where he kept his plate, was found open in the morning, and that it must have been opened by somebody on the inside: It is proved that nothing was missing, not an article of plate was touched, and that Mr. Dalrymple was seen by the two gardeners very early in the morning, coming away from the house, and in the vicinity of the house, going towards Edinburgh; and as to what was suggested that he might have been in the outhouses all night, I think it is not a very natural presumption, that a gentleman who was privately and habitually admitted into the house at such late hours as eleven or twelve o'clock at night, would have been ejected afterwards for the purpose of having so uncomfortable a situation for repose, as the gentlemen suppose, in some of the stables or hovels, belonging to the house.—There is another witness of the name of Brown, Mr. Dalrymple's own servant, whose evidence is strongly corroborative of the nature of those visits. This man is produced as a witness by Mr. Dalrymple himself, and he states that he was in the habit of privately conveying notes from his Master to Miss Gordon, which were to be concealed from her father.—He says to the second interrogatory, "that he often accompanied his master to Mr. Gordon's house at Edinburgh, but he cannot set forth the days upon which it was he so attended him there, except that it was between the 10th of May, and the 18th of July 1804," subsequently therefore to the execution of the last paper. This witness further states, "*that on the night of the 18th of July*, which was the last time Mr. Dalrymple was in or near Edinburgh in the said year 1804, he, by the orders of his master, waited with the curriple at the house of Charles Gordon, Esq. till about twelve o'clock, when Mr. Dalrymple came out of the said house, and got into the curriple, and rode away therein about a mile on the road towards Edinburgh, and then desired him to stop, and having told him to go and put up his horses in Edinburgh, and to meet him again on the same spot at six o'clock the next morning with the curriple, Mr. Dalrymple then got

out, and walked back towards the said Mr. Gordon's house, and on the next morning at six o'clock he met his master at the appointed spot, and brought him in his said curricule to Haddington, from whence he went in a chaise to the house of a Mr. Nisbet, in the neighbourhood of that town, where Mr. Dalrymple's father was then staying; that *he does believe that Mr. Dalrymple did, on the night of the said 18th of July, go back to, and remain in the said Mr. Gordon's country-house:*" and I think it is impossible for any body who has seen this man's evidence, and the evidence of the other witnesses, not to suppose that he did go there, and did take his repose for the night in that house. Now it is said, and truly said, in this case, that the witness Lyall, upon her cross-examination, says, "she does not think that they could have been in bed together, so far as she could judge;" what means she took to form her judgment does not appear; the view taken by her might be very cursory: she is an unmarried woman, and might be mistaken with respect to appearances, or the appearances might be calculated for the purposes of deception, in a connection which was intended to be, to a great degree, secret and clandestine. But the question is not what inference Lyall draws, but what inference the Court ought to draw from the fact proved by her evidence, that Mr. Dalrymple passed the whole of the night in Miss Gordon's room under all the circumstances described, with passions, motives, and opportunities all concurring between persons connected by ties of so sacred a nature.

Lady Johnstone, one of her sisters, has been relied upon as a strong witness to negative any sexual intercourse; and I confess it does appear to me rather an extraordinary thing, that that lady's observations and surmises should have stopped short where they did, considering the circumstances which might naturally have led her to observe more and to suspect more: she certainly was kept in the dark, or at least in a twilight state. It rather appears from the letters, that there were some quarrels and disagreements between Mr. Dalrymple and the gentleman who afterwards married this lady, and who was then paying his addresses to her; how far that might occasion concealment from her I cannot say. The father, for reasons of propriety and delicacy respecting himself and family, was to be kept in ignorance, and therefore it might be proper that only half a revelation should be made to the sister. She certainly states that upon her return to Braid, in the middle of June, she slept with her sister, and never missed her from her bed, and never heard any noise in the sister's dressing-room which led her to suppose that Mr. Dalrymple was there. I am far from saying that this evidence of Lady Johnstone's is without weight: In truth, it is the strongest adverse evidence that is produced on this point: But she admits, "that from what she had herself observed, she had no doubt but that Mr. Dalrymple had made his addresses to her sister in the way of marriage; that when the deponent used to ask her said sister about it, she used to laugh it off:" From which it appears that Miss Gordon did not communicate freely with her upon the subject. She says, "that never till after the proceedings in this cause had commenced had she heard that they had exchanged written acknowledgments of their being lawful husband and wife, and had consummated their marriage; but, on the contrary, always, till very lately, conceived that they had merely entered into a written promise with each other, so as to have a tie upon each other, that neither of them should marry another person without the consent of the

other of them." That is the interpretation this lady gives to the paper No. 10, though that paper purports a great deal more, and she says, "that although she did suspect that Mr. Dalrymple had at some time or times been in her sister's dressing-room, yet she never did imagine that they had consummated a marriage between them." But since it is clearly proved by the other witnesses that Mr. Dalrymple was in the habit of going privately to Miss Gordon's bed-room at night, and going out clandestinely in the morning, I cannot think that the ignorance of this witness respecting a circumstance with regard to which she was to be kept in ignorance, can at all invalidate the facts spoken to by the other witnesses, or the conclusion that ought to be deduced from them.

With respect to the letters written at such a time as this, I am not disposed to scan with severe criticism the love-letters of a very young gentleman, but they certainly abound with expressions which, connected with all the circumstances I have adverted to, cannot be interpreted otherwise than as referring to such an intercourse. I exclude all grossness, because, considered as a conjugal intercourse, it carries with it no mixture of grossness but what may be pardonable in a very young man, alluding to the raptures of his honey-moon, when addressing the partner of his stolen pleasures. I will state some passages, however, which appear to point at circumstances of this nature:—"My dearest, sweet wife—You are, I dare say, happy at Queen's Ferry, while your poor husband is in this most horrible place, tired to death, *thinking only on what he felt last night, for the height of human happiness was his.*" It is said that this has reference only to the happiness which he enjoyed in her society, for an expression immediately follows, in which he extols the happiness of being in the society of the person beloved: and it may be so, but it must mean society in a qualified sense of the word, *private and clandestine society*; society which commenced at the hour of midnight, and which he did not quit till an early hour (and then secretly) in the morning. That *society* is meant only in the tamest sense of the word, is an interpretation which I think cannot very well be given to such expressions as these, used upon such an occasion. In the letter marked No. 6, he says, "Put off the journey to Braid, if possible, till next week, as the town suits so much better for all parties. I must consult L. on that point to-morrow, as I well know how a-propos plans come into her pretty head; there appears to me only one difficulty, which is where to meet, as there is only one room; but we must obviate that if possible." In the next letter, No. 7, he says, "But I will be with you at eleven to-morrow night; meet me as usual.—P. S. Arrange every thing with L. about the other room."

There are several other expressions contained in these letters which manifestly point to the fact of sexual intercourse passing between them. These I am unwilling to dwell upon with any particular detail of observation, because they have been already stated in the arguments of counsel, and are of a nature that does not incline me to repeat them without absolute necessity; I refer to the letters themselves, particularly to No. 4, and No. 6. But it is said, here are passages in these letters which show that no such intercourse could have passed between them; one in particular in No. 4, is much dwelt upon, in which he says, "Have you forgiven me for what I attempted last night; believe me the thought of your cutting me has made me very unhappy." From which it is inferred that he had made an attempt to consummate his marriage, and had

been repulsed. Now this expression is certainly very capable of other interpretations: It might allude to an attempt made by him to repeat his pleasures improperly, or at a time when personal or other circumstances might have rendered it unseasonable. In the very same letter he exacts it as *a right*. He says, "You will pardon it; although it was my right, yet I make a determination not too often to exert it; what a night shall I pass without any of those heavenly comforts I so sweetly experienced yesterday."

In a correspondence of this kind, passing between parties of this description, and alluding to very private transactions, some degree of obscurity must be expected. Here is a young man heated with passion, writing every day, and frequently twice in a day, making allusions to what passed in secrecy between himself and the lady of his affections; surely it cannot be matter of astonishment, that many passages are to be found difficult of exact interpretation, and which it is impossible for any but the parties themselves fully to explain. What attempt was made does not appear; this I think does most distinctly appear, that he did at this time insist upon his rights, and upon enjoying those privileges which he considered to be legally his own. Wherever these obscure and ill-understood expressions occur, they must be received with such explanations as will render them consistent with the main body and substance of the whole case. Another passage in the letter No. 5, which is dated on the 30th of May, has been relied upon as showing that Mr. Dalrymple did not consider himself married at that time. In that letter he says, "I am truly wretched, I know not what I write, how can you use me so? but (*on Sunday, on my soul**) you shall, you must become my wife, it is my right," and therefore it is argued that she had not yet become his wife. The only interpretation I can assign to this passage, which appears to have been written when he was in a state of great agitation, is, that on Sunday she was to submit to what he had described as the rights of a husband. It is not to be understood that a public marriage was to be executed between them on that day, because it is clear, from the whole course and nature of the transaction; that no such ceremony was ever intended: It appears from all the facts of the case, that it was to be a private marriage, that it was so to continue, and therefore no celebration could have been intended to take place on that approaching Sunday.

In a case so important to the parties, and relating to transactions of a nature so secret, I have ventured to exercise a right not possessed by the advocates, of looking into the sworn answers of the parties upon this point: and I find Miss Gordon swears positively that intercourse frequently passed between them subsequently to the written declaration or acknowledgment of marriage. Mr. Dalrymple swears as confidently that it did not so take place, but he admits that it did on some one night of the month of May, prior to the signature of the paper marked No. 1; the date of which, however, he does not assign, any more than he does that of the night in which this intercourse did take place. Now consider the effects of this admission. It certainly does often happen that men are sated by enjoyment; that they relinquish with indifference, upon possession, pleasures which they have eagerly pursued: but it is a thing quite incredible that a man, so sated and cloyed, should afterwards

bind himself by voluntary engagements, to the very same party who had worn out his attachment. Not less inconsistent is this supposition with the other actual evidence in the case, for all these letters, breathing all these ardors, are of a subsequent date, and prove that these sentiments clung to his heart as closely and as warmly as ever during the whole continuance of his residence in Scotland. I ask if it is to be understood, that with such feelings he would relinquish the pleasures which he had been permitted to enjoy, and which he appears to value so highly, or that she would deny him those pleasures for the consolidation of her marriage, which she had allowed him, according to his own account, gratuitously and without any such inducement.

On this part of the case I feel firm. It is not a point of foreign law on which it becomes me to be diffident; it is a matter of fact examinable upon common principles; and I think I should act in opposition to all moral probabilities, to all natural operations of human passions and actions, and to all the fair result of the evidence, if I did not hold that consummation was fully proved. If this is proved, then is there, according to the common consent of all legal speculation on the subject, an end of all doubt in the case, unless something has since occurred to deprive the party of the benefit of a judicial declaration of her marriage.

What has happened that can have such an effect? Certainly the mere fact of a second marriage, however regular, can have no such effect. The first marriage, if it be a marriage upheld by the law of the country, can have no competitor in any second marriage, which can by legal possibility take place; for there can be no second marriage of living parties in any country which disallows polygamy. There may be a ceremony, but there can be no second marriage—it is a mere nullity.

It is said, that by the law of Scotland, if the wife of the first private marriage chooses to lie by, and to suffer another woman to be trepanned into a marriage with her husband, she may be barred *personali exceptione* from asserting her own marriage. Certainly no such principle ever found its way into the law of England; no connivance would affect the validity of her own marriage; even an active concurrence on her part, in seducing an innocent woman into a fraudulent marriage with her own husband, though it might possibly subject her to punishment for a criminal conspiracy, would have no such effect. But it is proper, that I should attend to the rule of the law of Scotland upon this subject. There is no proof, I think, upon the exhibition of Scotch law, which has been furnished to the Court, that such a principle was ever admitted authoritatively; for though in the gross case of *Campbell v. Cochrane*, in the year 1747, the Court of Session did hold this doctrine, yet it was afterwards retracted and abandoned, on the part of the second wife, before the House of Lords, which, most assuredly, it would not have been, if any hope had been entertained of upholding it as the genuine law of Scotland, because the second wife could never have been advised to consent to the admission of evidence, which very nearly overthrew the rights of her own marriage. Under the correct application of the principles of that law, I conceive the doctrine of a *medium impedimentum* to be no other than this, that on the *factum* of a marriage, questioned upon the ground of the want of a serious purpose, and mutual understanding, between the parties, or indeed on any other ground; it is a most important circumstance, in opposition to the real existence of such serious purpose and understanding, or of the existence of a marriage,

that the wife did not assert her rights, when called upon so to do, but suffered them to be transferred to another woman, without any reclamation on her part. This doctrine of the effect of a mid-impediment in such a case, is consonant to reason and justice, and to the fair representations of Scotch law given by the learned advocates, particularly by Mr. Cay, in his answer to the third additional interrogatory, and Mr. Hamilton, in his answer to the first further additional interrogatory; but surely no conduct on the part of the wife, however criminal in this respect, can have the effect of shaking *ab initio* an undoubted marriage.

Suppose, however, the law to be otherwise, how is it applicable to the conduct of the party in the present case? Here is a marriage, which at the earnest request of this gentleman, and on account of his most important interests (in which interests her own were as seriously involved) was not only to be secret at the time of contracting, but was to remain a profound secret till he should think proper to make a disclosure; it is a marriage in which she has stood firm in every way consistent with that obligation of secrecy, not only during the whole of his stay in Scotland, but ever since, even up to the present moment. She corresponded with him as her husband till he left England, not disclosing her marriage even to her own family on account of his injunctions of secrecy. Just before he quitted this country, he renewed in his letters those injunctions, but pointed out to her a mode of communicating with him by letter, through the assistance of Sir Rupert George, the first Commissioner of the Transport Board. In the same letter, written on the eve of his departure for the Continent, he cautions her against giving any belief "to a variety of reports which might be circulated about him during his absence, for if she did, they would make her eternally miserable. I shall not explain," he says, "to what I am alluding, but I know things have been said, and the moment I am gone will be repeated, which have no foundation whatever, and are only meant for the ruin of us both: once more, therefore, I entreat you, if you value your peace or happiness, believe no report about me whatever."

No doubt, I think, can be entertained, that the reports to which he in this mysterious language adverts, must respect some matrimonial connections, which had become the subjects of public gossip, and might reach her ear. Nothing, however, less than certain knowledge was to satisfy her, according to his own injunction, and nothing could, I think, be more calculated to lull all suspicion asleep on her part. It appears, however, that it had not that complete effect, for Mr. Hawkins says, that upon the return of Mr. Dalrymple, in the month of August 1806, when he came to England privately without the knowledge of his father, or of this lady, he then, for the first time "communicated to him many circumstances respecting a connection, he stated he had had, with a Miss Johanna Gordon at Edinburgh, and expressed his fears that she would be writing and troubling his father, upon that subject, as well as tormenting him the said John William Henry Dalrymple with letters, to avoid which, he begged him not to forward any of her letters to him who was then about to go to the Continent, and in order to enable him to know her hand-writing, and to distinguish her letters from any others, he then cut off the superscription from one of her letters to him, which he then gave to the deponent for that purpose, and at the same time swore, that if he did forward any of her letters, he never would read them; and he also desired and entreated him to prevent any of Miss Gordon's letters

from falling into the hands of General Dalrymple, and that he went off again to the Continent in the month of September." Mr. Hawkins further says, "that he did find means to prevent several of Miss Gordon's letters addressed to General Dalrymple, from being received by him, but having found considerable risque and difficulty therein, and in order to put a stop to her writing any more letters to General Dalrymple, he the deponent did himself write and address a letter to her at Edinburgh, wherein he stated that the letters, which she had sent to General Dalrymple, had fallen into his hands to peruse or to answer, as the General was himself precluded from taking any notice of letters from the precarious state he was in, or to that effect, and urged the propriety of her desisting from sending any more letters to General Dalrymple; and the deponent having, in his said letter, mentioned that he was in the confidence of, and in correspondence with Mr. Dalrymple, she soon afterwards commenced a correspondence with him respecting Mr. Dalrymple, and also sent many letters, addressed to Mr. Dalrymple, to him, in order to get them forwarded; but the deponent having been particularly desired by Mr. Dalrymple not to forward any such letters to him, did not send all, but thinks he did send one or two, in consequence of her continued importunities;" he says, "that it was sometime in the latter end of the year 1806, or the beginning of the year 1807, that the correspondence between Miss Gordon and himself first commenced; and that after the death of General Dalrymple, which he believes happened in or about the spring of the year 1807, she, in her correspondence with him, expressly asserted and declared to him her marriage with Mr. Dalrymple."

It appears then that Miss Gordon knew nothing of Mr. Hawkins, except from the account he had given of himself, that he was the confidential agent of Mr. Dalrymple, and therefore she might naturally have felt some hesitation about laying the whole of her case before him, especially as General Dalrymple was alive, till whose death the marriage was to remain a profound secret; but upon that event taking place, which happened at no great distance of time, Miss Gordon instantly asserted to Mr. Hawkins her marriage with Mr. Dalrymple, and he, wishing to be furnished with the particulars, wrote to her for the purpose of obtaining them, which she thereupon communicated, and at the same time sent him a copy of the original papers, which, in the language of the law of Scotland, she called the *marriage lines*.—She mentioned likewise some bills which had been left unpaid by her asserted husband, upon which he wrote to Mr. Dalrymple, he says, "that he has no doubt Mr. Dalrymple received the letters, because he replied thereto from Berlin or Vienna, and caused the bills to be regularly discharged." He says, "that in the latter end of May, in the year 1808, Mr. Dalrymple returned again to England."—I ought to have mentioned that it appears clearly, that Miss Gordon had been sending letters to Mr. Hawkins, expressive of her uneasiness on account of the reports which had prevailed of a marriage about to be entered into by Mr. Dalrymple. She says, in a letter to Mr. Hawkins, "I shall have no hesitation in putting my papers into the hands of a man of business, and establishing my rights, as it is a very unpleasant thing to hear different reports every day; the last one is, that Mr. Dalrymple had ordered a new carriage on his marriage with a nobleman's daughter."

This description cannot apply to the marriage which has since taken
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place with Miss Manners, but is merely some vague report which it seems had got into common discourse and circulation. On the 9th of May, she writes to know whether any accounts had been received from Mr. Dalrymple, and says, "Any real friend of Mr. Dalrymple's ought to caution him against forming any new engagement;" and she protests most strongly against his entering into a matrimonial connection with another woman. In the end of that very month of May, Mr. Dalrymple came home, having been at different places on the continent; he went down to Mr. Hawkins's house at Findon, where having met him, they conversed together upon Mr. Dalrymple's affairs, and particularly upon his marriage with Miss Gordon, and on that occasion, Mr. Hawkins having at this time no doubt left upon his mind of the marriage, and fearing from the manner and conduct of Mr. Dalrymple, that he had it in contemplation to marry Miss Manners, the sister of the Duchess of St. Alban's, he cautioned him in the most anxious manner against taking such a step, and in the strongest language which he was able to express, described the mischiefs which would result from such a measure, both to himself and the lady, and the difficulties in which their respective families might be involved, owing to Mr. Dalrymple's previous marriage.

Mr. Hawkins thought, at the time, that those admonitions had had the good effect of deterring him from the intention of marrying Miss Manners, though he mentions a circumstance which bears a very different complexion, viz. that Mr. Dalrymple took from him, almost by force, some of Miss Gordon's letters, and particularly those annexed to the allegation. He says, "that Mr. Dalrymple took them under pretence of showing them to Lord Stair, and seemed by his manner and expressions to consider that he had thereby possessed himself of the means of showing that Johanna Dalrymple was not his wife." It was about the end of the month of May, that Mr. Hawkins and Mr. Dalrymple held this conversation at Findon, and upon the 2d of the following month, Mr. Dalrymple was married to Miss Manners, before it was possible that Miss Gordon could know the fact of his arrival in England. Upon her knowledge of the marriage, she immediately proceeds to call in the aid of the law. I profess I do not see what a woman could with propriety have done more to establish her marriage rights; Mr. Dalrymple was all the time abroad, and the place of his residence perfectly unknown to her; no process could operate upon him from the Courts, either of Scotland or England, nor was he amenable in any manner whatever to the laws of either country.

She did all she could do under the obligations of secrecy, which he had imposed upon her, by entering her private protest against his forming any new connection; she appears to me to have satisfied the whole demands of that duty, which such circumstances imposed upon her; and I must say, that if an innocent lady has been betrayed into a marriage, which conveys to her neither the character nor rights of a wife, I cannot, upon any evidence which has been produced, think that the conduct of Miss Gordon is chargeable either legally or morally, with having contributed to so disastrous an event.

Little now remains for me, but to pronounce the formal sentence of the Court, and it is impossible to conceal from my own observation the distress which that sentence may eventually inflict upon one, or perhaps more individuals; but the Court must discharge its public duty, how-

ever painful to the feelings of others, and possibly to its own; and think I discharge that duty in pronouncing, that Miss Gordon is the legal wife of John William Henry Dalrymple Esq. and that he, in obedience to the law, is bound to receive her home in that character, and to treat her with conjugal affection, and to certify to this Court that he has so done, by the first Session of the next Term. (a)

(a) From this decree an appeal was alleged and prosecuted to the Court of Arches. In the course of those proceedings an intervention was given for Laura Dalrymple—described as wife of John William Henry Dalrymple Esq. the Appellant in the cause. On the 3d Session of Mich. Term, viz. 18th of November 1811, an allegation was asserted on her behalf, and the Judge assigned to hear, on the admission thereof, on the by-day. On that day, viz. 4th of December, her Proctor prayed the assignation to be continued, which was opposed; and the Judge concluded the cause, and assigned the same for sentence on the next court day. On the first Sess. Hil. Ter. viz. January 1812, her Proctor alleged the cause to have been appealed: and the appeal was accordingly prosecuted to the High Court of Delegates, where the grievance complained of was, “that the Judge of the Court of Arches had rejected the prayer, of the said Laura Dalrymple, for *time* to be allowed for the admission of an allegation on her behalf.” Time was allowed by the Court of Delegates—And the cause there being retained, her allegation was given in, and opposed, and ultimately rejected. The cause was afterwards heard upon the merits: and on the 19th of January 1814, the sentence of the Consistory Court was affirmed.

The Office of the Judge promoted by COX v. GOODDAY.—p. 138.

Offence [brawling] under the st. 5 and 6 E. 6. c. 4. as charged against the Clergyman, for words spoken during Divine Service.—Defence—that they were justifiable as re-proof,—not sustained.

POUGET v. TOMKINS, falsely calling herself POUGET.—p. 142. *3 Mar. & S. 262.*

[S. C. 1 Phil. Rep. 499. 1 Eng. Eccl. Rep. 161.]

Nullity of marriage, by reason of *false* and *imperfect* publication of banns. Omission of one Christian name, which had been the name most commonly used—*fatal*.

HARRIS v. HARRIS.—p. 148.

[See the Report, 1 Eng. Eccl. Rep. 204.]

Divorce by reason of cruelty, on words of menace accompanied by violence, &c. 270.

WARING v. WARING.—p. 153.

[See the Report, 1 Eng. Eccl. Rep. 210.]

Suit of Divorce brought by the wife, for cruelty.—Justification, from the conduct of the wife sustained. 270.

7/11. 2 57.

PARNELL v. PARNELL.—p. 169.

[See the Report, 1 Eng. Eccl. Rep. 220.]

Committee of a lunatic competent to institute a suit of divorce, by reason of the adultery of the wife, on behalf of the lunatic.

DAYS, falsely called JARVIS, v. JARVIS.—p. 172.

Nullity of marriage by *licence*, by reason of minority and want of consent [of the parent,] sustained.

EWING, falsely called WHEATLEY, v. WHEATLEY.—p. 175.

Nullity of marriage, by reason of fraud and alteration of *licence*, not sustained.

SEARLE v. PRICE, falsely called SEARLE.—p. 187.

Suit of nullity of marriage, by reason of a former marriage, sustained.—Strict proof required of the identity of the parties.

THIS was a suit instituted by Edward Blakemore Searle, of the parish of St. Peter, Cornhill, against Sarah, his wife, to annul his marriage with her, on the ground of a former marriage, alleged to have taken place between her and one Charles Price, who was living at the time of the latter marriage.

On the part of Mrs. Searle, Dr. *Burnaby* and Dr. *Jenner* contended, that there was not sufficient proof (a) to identify the parties to the second marriage, as being the actual parties in the present cause; that the mere belief of that fact, expressed by two witnesses present at the latter marriage, undeduced from any fact stated by them to warrant such a belief, was insufficient; that the admissions or acknowledgments of the party herself could not, even if more consistent with each other than they actually were, be admitted to supply that deficiency, or furnish, in any way, grounds for a sentence in a case of this nature.

On the other side, Dr. *Stoddart* and Dr. *Lushington* submitted—

(a) On the opening of the case, the counsel for Mrs. Searle took an objection to the reading of the evidence of Price, the alleged first husband, on the ground that it was a received principle of law, that a husband and wife cannot be witnesses either for or against each other; a principle resting on the consideration, that their evidence, if in each other's favour, was open to the presumption of an undue bias, and if of an adverse character, might lead to dissensions in families, which it was the policy of the law to discourage and repress. To this it was replied, that it was not competent to the wife to take this objection, or she would thereby admit the principal fact in question, and convict herself of an act of bigamy; and that as to the evidence of the husband, it would not tend to affect any interest under his relation to his wife, or to exonerate himself from any responsibility, but rather to onerate himself with the obligations attending the character of husband.

The Court permitted the evidence to be read, *de bene esse*, reserving the point for more formal argument, in the event of the case appearing to depend, in any material degree, upon the evidence objected to.

that the belief of identity, expressed by the two witnesses to the second marriage, was sufficiently supported by the nature of the *confrontation*; that the party was cited to be confronted as the party in the cause; that she appeared, in obedience to the mandate of the Court, in that character, and the general conduct of the suit in her name, and on her behalf, confirmed the fact. If, however, the Court should still hesitate on this point, they hoped it would, for its own satisfaction, extend to them the indulgence of rescinding the conclusion of the cause, to enable them to confront the party with other witnesses, in support of the identity.

JUDGMENT.

Sir WILLIAM SCOTT.

In this case it is sufficiently established, that a Charles Price was married, on the 20th of December 1783, to a Sarah Pollard, and that a Sarah Price was married on the 28th of February 1811, to Edward Blake-more Searle, at which time the Charles Price, first married, was living. The only question therefore is, whether the Sarah Pollard, who was married to Price, is the Sarah Price who was married to Searle; whether, in fact, the identity, as to the second marriage, is proved in a way satisfactory to the Court.

In all cases where a dissolution of marriage is the object of the suit, it is the especial duty of the Court, to guard against imposition: where an existing marriage is proved, it is not to be exposed to the danger of being set aside by any species of collusion; and should only be brought into question upon the most undisputed proofs. It greatly concerns the interests of families, that the marriage contract should be preserved inviolate. Experience of the world plainly shows, that married persons are often but too ready to seek a release from the nuptial chain, and too little scrupulous of the means of effecting it. For this purpose a false case might be established before the Court, whose utmost vigilance is therefore requisite, that the truth should be established, independent of the confessions of the parties. In cases of adultery, no confession of the fact can be admitted alone, and, in cases of this description, it is the more necessary to guard against the imposition of making false acknowledgments to obtain a separation. A married person may afterwards wish the marriage avoided; for this purpose a former marriage might be propounded by the one party and admitted by the other; but the Court could not rely on declarations thus made, and that too not on oath, in furtherance of the common purpose. They might go further; by substituting false parties, who might admit themselves to be parties in the cause, when they were not, and various impositions of this nature might be resorted to, to destroy the rights of the real parties. Even a decree of *confrontation* would not protect the Court in such a case, as the real parties might be unknown to the officers of the Court, unknown to the practisers, and certainly unknown to the Court itself; so that, in this way, a real marriage might be set aside, without the least knowledge on the part of those interested in it. It is, therefore, a clear rule, and a rule, founded on the necessity of the case, that the identity must be proved, by other testimony than that of the parties themselves; it must be proved by witnesses, who can speak to the facts from their own personal knowledge. What could have been more easy in the present case, than for a person to have appeared to the decree of *confrontation*, and have acknowledged herself the party in the cause? It is therefore necessary, that the party should be produced to witnesses, who have known her in

both characters, or to one witness, at least, who may have known her in each; why this was not done in the present case is a circumstance, perhaps, not easily explained, however much it may be lamented, on account of the inconvenience that has been occasioned by it.

The Court cannot but remark, that the result of the evidence on the present case, compared with the principles that it has thus briefly laid down, appears liable to much objection. Mr. Phippen, the witness to the second marriage, speaks only to his belief of the identity; on what he grounds such a belief does not appear, as he states no antecedent facts within his knowledge, from which the Court can judge of its accuracy. On the decree of confrontation, the evidence adduced is that of two witnesses, who knew the party as Mrs. Price, and who prove, that she then acknowledged herself to be the party in the cause; so that this part of the case rests only on that acknowledgment, and that is insufficient. A decree of *confrontation* is an assistance to the proof, only to be applied for on special grounds, and yet this is all that has been done upon it in the present case. The other evidence, that of the admissions of the party in conversation, resolves itself into the same point, as, if the Court relies on that, it will pronounce a sentence upon the mere confession of parties.

Under these circumstances, it is impossible that the Court can come to the conclusion, that there is sufficient evidence to satisfy the strict demands of the law, in a case like the present. If any case, however, can be produced where a party, after having had the benefit of one degree of *confrontation*, has afterwards received the indulgence of another, (of the existence of which the Court much doubts,) it will yield, though not without reluctance, to the application now made. If, however, no such case can be produced by the next Court day, it will then pronounce for a failure of proof, and dismiss the suit.

On a subsequent day, it was shown to the Court that three of the former witnesses had been re-examined, with the addition of one new witness; that two of them deposed to the first marriage, and the other two to the second; that they had all had an opportunity of seeing the wife, upon the occasion of her being examined at the police office, Queen-Square, upon a charge of bigamy, and that they all concurred now in identifying her.

JUDGMENT.

SIR WILLIAM SCOTT.

The Court was certainly of opinion, at the former hearing of the cause, that there was a material defect as to the identity of the party proceeded against. The indulgence of a decree of *confrontation* had been granted, but the result was not such as the Court was entitled to expect. It was necessary that the wife should have been *confronted* with a witness who knew her in both characters, or with two or more at the same time, who could separately identify her in each.

The acknowledgment, however, by the party produced, that she was the party in the cause, seemed to have been too much relied on. Acknowledgment, indeed, is a term, in such a case, improperly applied, as it is no acknowledgment at all, unless the party is otherwise proved to be the party in the cause; and, without such proof, the acknowledgment is open to the suspicion of having been collusively made, and by

another than the real party. The person, however, has now been seen by the witnesses, not indeed under a decree of *confrontation*, but under a *confrontation* otherwise effected, and the defect is supplied to the satisfaction of the Court. It is proved that the party thus *confronted*, is the person with respect to whom both the marriages are proved; the witnesses connect her with each, making a complete chain of evidence that she is one and the same person. The Court then is of opinion, that the proof is now complete in all respects, and it has no longer any hesitation in signing the sentence of nullity accordingly.

FIELDER v. SMITH otherwise NELSON, falsely called FIELDER.
p. 193.

Nullity, by reason of the want of due consent: the mother, who had given consent, being alleged to be the *natural mother*.—Evidence on that point, how considered,—not *sufficient*; party dismissed.

BRISCO v. BRISCO.—p. 199.

Alimony, pending suit of divorce, proportion, according to circumstances, 200*l.* given in addition to separate income.

WILSON v. WILSON.—p. 203.

2 *Paro*, 113.

6H.57,372

Costs of the wife, having a sufficient independent income, not allowed to be taxed, against the husband, during the proceedings.

MEDDOWCROFT v. GREGORY, falsely calling herself MEDDOW-
CROFT.—p. 207.

7H.438

Nullity of marriage, by banns, by reason of minority and want of consent of the father. On the suit of the father, sustained.

WYATT, falsely called HENRY v. HENRY.—p. 215.

Nullity of marriage, by a publication of banns in a false name, sustained.—Nature of proof required as to *identity*.

BURGESS v. BURGESS.—223.

Divorce, by reason of adultery; Proof,—confession of the particeps criminis, as connected with the act of the wife, admitted.

THIS was a cause of restitution of conjugal rights, instituted by Mrs.

Burgess, in which an allegation was given, on the part of Mr. Burgess, pleading the adultery of the wife, and praying divorce on that ground.

JUDGMENT.

SIR WILLIAM SCOTT.

This suit commenced by a citation on the part of the wife. The prayer of Mrs. Burgess is met by an allegation on the part of the husband, pleading facts of adultery, and, on that ground, praying the legal remedy of divorce. A responsive allegation has been given in by the wife: witnesses have been examined on both pleas; and, upon their evidence, the case now comes on for hearing.

It is proper that I should consider, in the first place, the proofs of the charge against the wife; because if that is sufficiently proved, it will exclude her prayer for a restitution of conjugal rights; and if it is not proved, it will exclude his prayer for a divorce, and he will still lie under the necessity of cohabitation with her.

The marriage is admitted and proved on both sides, it took place at Lambeth in the month of August 1802, and the parties lived together from that time until January 1812, and had several children. It appears, that Mr. Lane, a young gentleman, was introduced into this family about the latter end of the year 1813, or the beginning of 1814; that until that time the husband and wife had lived in a sufficient degree of amity. He was an affectionate husband, and fond of seeing his wife admired; and she met his affection with no return of unkindness on her part; their harmony was uninterrupted, notwithstanding differences which had occurred with respect to the settlement of some family property; and it does not appear to have been affected by any waywardness of disposition on her part. There was no ground to complain of any want of attachment on the part of the husband: If any thing was to be observed, he might be said to have entertained a blind confidence in her, unsuspecting of those consequences, which might have been anticipated by a man of greater caution. In short, nothing materially affected their domestic peace, until Mr. Lane was introduced into the family; caressed and courted by the husband, and unhappily by the wife also, if the facts charged are true.

In September 1814, Mr. and Mrs. Burgess, with their two children, went on a visit to the Rev. Mr. Lloyd, a friend of theirs, at his living, in Northamptonshire. Mr. Lane accompanied them. The visit appears to have lasted about a fortnight, and, during that time, Mrs. Burgess's conduct to Mr. Lane attracted Mr. Lloyd's observation: he says, "that he observed Mr. Lane was very attentive to her, and that she appeared desirous of attracting and engrossing his attention; that she was always desirous of sitting next to him at table, and on various other occasions, either in the carriage or on the barouche box; but that he never saw any thing in her conduct that approached to indecent familiarity, nor were any liberties taken in his presence, but she showed a partiality to his society; that, on one occasion in particular, when they were all on a fishing party, Mrs. Burgess separated herself from the rest of the party to return with Mr. Lane to a spot, which they had left, at a distance of more than half a mile from where they then were, contrary to Mr. Lloyd's expressed wish."

In November of the same year, Mr. Lane, the father of this young man, at the request of his son, and as an acknowledgment of their civilities to him, gave them an invitation to pass a few days at his house at

Leyton. During this visit, Mr. Lane observed the conduct of his son and Mrs. Burgess towards each other; and though he did not see any personal liberties taken, yet there was generally such a particular and improper familiarity in their behaviour towards each other, as gave him great uneasiness, and induced him to remonstrate with his son, very strongly, on the impropriety of their mutual conduct.

It is objected, on the part of the lady, that all this passed in the presence of the husband, or within the scope of his observation, and it is asked why did he not take notice of it? Undoubtedly it would have been more prudent in him to have so done; for such marked attentions, and such acts, as sitting almost in Mrs. Burgess's lap, were, to say the least of them, very unseemly, and such as are not at all usual, in persons of a class of life above the lower orders; but sometimes a husband's fondness renders him as blind to his wife's faults as to his own; and if that was not the case here, where was the proof that Mr. Burgess did not remonstrate? A man does not usually go upon the house-tops to reprove an impropriety of conduct in his wife; such remonstrances are more usually confined to hours of privacy; and it does not appear, that Mr. Burgess had not availed himself of some such opportunity; for the circumstance of his wife's not desisting from that course of behaviour, was no proof that no remonstrance had been made; as it is pretty evident, from many circumstances in the case, that it was not amongst this lady's peculiarities, that she had not a will of her own. It has been said also, why did not Mr. Burgess forbear Mr. Lane's company? It would, certainly, have been better if he had; but his not doing so, furnishes no very serious inference against him, as he, perhaps, did not think there was any thing really culpable in what was passing.

The criminal licence that arose out of this attachment was, during a visit of the parties at Ryes, the seat of Mr. Chamberlayne, in Hertfordshire, where they all went, for a few days, at Christmas 1814; here affairs assumed a more serious aspect still, and it is here that a charge of adultery is made, and made for the first time; for no part of the evidence refers to such a charge elsewhere. It was confined within the limits of this visit, between the 23d and 29th of December, and within this time it must have occurred, or not at all.

In considering the legal effect of this evidence, I must proceed on the established doctrine of this Court, as it has been laid down in various cases; that it is not necessary to prove the fact of adultery, at any certain time, or place, *modo et forma, loco et tempore*. It will be sufficient, if the Court can infer that conclusion, as it has often done between persons living in the same house, though not seen in the same bed, or in any equivocal situation. To prevent, however, the possibility of being misled by equivocal appearances, the Court will always travel to this conclusion with every necessary caution; whilst, on the other hand, it will be careful not to suffer the object of the law to be eluded, by any combination of parties, to keep without the reach of direct and positive proof. If, then, proof of a specific act is not necessary, it is equally unnecessary that a confession, if confession there be, should apply to a particular time and place. The confession, if general, will apply to all times and places at which it might appear probable, in proof, that the fact might have taken place. Another principle is equally clear, that confession *alone* cannot be received; so says the Canon (Canon 105); for, without this restriction, there would be no check upon the collusion,

and imposition, that might be practised on the Court. Here, however, there is no such danger: the suit commenced, in the first instance, for a restitution of conjugal rights, and the confessions are strongly opposed to such a claim. They appear confessions wrung from a heart against its inclination, and though I will not say, that they are not within the general rule, they do not fall within the particular scope of it. Under these observations, I shall proceed to consider the effect of the evidence as to adultery.

It is deposed by Mr. Staines Bocket Chamberlayne, "that, during the time Mrs. Burgess and Mr. Lane were at Ryes, they took every opportunity of being alone together; that, in the evening, when the family were assembled in the drawing-room, they used to go together to the piano-forte, where she used to play and sing to him; that, on the first evening when they did this, some others of the family went to pay her the civility of standing by her; that this was evidently not agreeable to her, she was disconcerted by it, in consequence of which, they were on the subsequent evenings left to themselves: that it was also Mrs. Burgess's custom, when any of the other ladies sat down to the instrument, to move away immediately to another part of the room; that she was followed by Mr. Lane, who was always in attendance upon her; and that she appeared better pleased to be engaged in conversation with him alone, than to join any other of the family." It appears also, that they both left the room in the evening: there are other members of this family, who say "that they courted each other's society, and paid a degree of attention to each other which was remarkable, and to such a degree as to be wanting in attention and civility to the rest of the company." Mr. Chamberlayne deposes still more strongly—"that they sat very close to each other continually; too close a great deal; and that he remarked it to them in a friendly and jocular manner; that Mr. Lane was sometimes sitting almost in Mr. Burgess's lap, when the witness told him 'he gave her no room to move;' to which she replied, 'that she had room enough.'"

These statements, taken together, are sufficient to establish a high and undue degree of familiarity, between these parties. It has been argued, that one was an isolated and detached fact; that another was so likewise; and that none of them led to a conclusion of crime; but this is not the proper way to consider such evidence: the facts are not to be taken separately only, but in conjunction; they mutually interpret each other; their constant repetition gives them a determinate character; and such habits continuing to be persevered in in public, it is to be inferred, that the parties would go greater lengths, if opportunities of privacy occurred. Such gross indecorums, and improper familiarities, with opportunities of privacy, advance to the footing of proximate acts; and if the privacy be shown to be frequent, the Court will infer the commission of crime. Nor is evidence of this sort wanting. The parties met together, apparently by agreement, in the breakfast-room, before the rest of the company were assembled. Mr. Chamberlayne speaks to this part of the history, "that he used to joke with them, as being early risers;" and though this place might be too public for any criminal act, it was not so for assignations and appointments. After dinner, *she* withdraws from the ladies, and *he* leaves the gentlemen. Her pretence was, that she might superintend the putting of her youngest child to bed: she does not return to the ladies, nor *he* to the gentlemen. Their absence is shown to have been

habitual, and that they retired about the same time. Circumstances, such as these, connected with the proof of previous intimacy, must be considered as laying a strong ground of probability, that they met, at such times, in private interviews.

There are, however, one or two facts which require still more particular observation. It was the intention of the family to be present at a ball at Hertford, on Tuesday the 27th of December; but that intention was afterwards abandoned. Mr. Chamberlayne, junior, after the idea of the ball had been given up, went out into the garden, about an hour and a half before dinner, and before the family had retired to dress, when he observed the curtains of Mr. Lane's room drawn—this attracted his notice; upon which he went into the drawing-room, where several of the ladies then were, but not Mrs. Burgess: it is proved also, that she was not in her own room at that time. There is another circumstance also deposed to—"that Mr. Lane, having torn his hunting-coat, and it having been but indifferently mended, spoke of getting Mrs. Burgess's maid to mend it better; that, in the evening, after the gentlemen were assembled in the drawing-room, tea being over, and a card-table about being set out, Mr. Lane left the room, saying, he would go and see if he could get his coat mended a little better; that, when he was gone, Mr. Burgess asked his wife to sit down to cards, which she declined; that he pressed her to play that evening, saying, he wished to talk to Mr. Chamberlayne, but she refused; and presently afterwards, Mr. Burgess having said, if she would not, he must, she left the room. She returned in a few minutes, popped her head in, and said, 'So you have sat down,' appearing to address her husband; and then coming to the table, she asked, how far they had got? and nothing being scored on either side, as they were then playing the first deal, she said, 'Oh, you have just begun,' and again left the room; that neither she or Mr. Lane returned for as much as an hour; that when they did return, they appeared much flurried and agitated; she sat down to the instrument, and sang in a hurried manner; her neck was very red, she was a good deal heated, and so was Mr. Lane, all of which attracted the deponent's attention so much, that he observed, jokingly to them, 'that they had had warm work with the coat; that he supposed they had all been at it, and that it had been a hard job to require all three,' alluding to the maid as the third. He noticed that she was touchy and out of humour at this; that when they sat down together at supper, he remembers that she drank an unusual quantity of ale, and that both of them ate quite voraciously, and were in a continued state of agitation, which they appeared anxious to conceal."

This, again, is not to be taken as a solitary fact, but in connection with the habits before described; and with the opportunity of privacy, that was so afforded and so sought, it would be losing sight of the natural effect of human passions, excited as those of these parties were, not to infer the consequences that are imputed to them. There is also the evidence of the servants, as to seeing Mrs. Burgess often coming out of Mr. Lane's bed-room: Stone, the butler, says, "that one day about three or four o'clock in the afternoon, having occasion to go up stairs into the passage, where Mr. Lane's bed-room was situated, he saw Mrs. Burgess coming out of Mr. Lane's bed-room: she closed the door after her, but not so as to shut it close or hard; nothing was said; but just then he heard a man's voice in the room, which he knew to be Mr. Lane's, but he could not distinguish what he said."

Here is an act of a married woman being seen to come out of the bedroom of a young unmarried man; a circumstance which, generally speaking, might only be considered in the light of a very high indecorum; but it is, in the present case, to be taken in conjunction with the whole conduct of these parties, and the Court is then to consider what would be the probable consequence of such an opportunity of privacy, between them. She was seen also coming out of this room, on another occasion, and there are other opportunities of being alone together fully established.

Having now considered the testimony of others, I proceed to the testimony of her own conduct: this appears to me to have been such, as to leave no moral doubt of her guilt, both from her verbal acknowledgments, and from her letters. In her letters there are expressions, which show the commission of the crime imputed to have happened at this place, which would entitle the husband to the sentence which he prays.

Mr. Burgess returns home, and is followed by his wife and children, and by Mr. Lane. There was great uneasiness then existing, according to the evidence of the maid-servant, who deposes, that they then both appeared in low spirits; that she did not know the cause, and had no reason to suppose that Mr. Burgess suspected his wife's fidelity. She did not think, that any thing serious was the matter, until the 5th of January following, when she was rather surprised at Mr. Burgess sending a verbal message that he should not dine at home that day. He did not return until past eleven o'clock at night, when Mrs. Burgess was in bed; that, about an hour afterwards, she came to deponent's room, and desired her to prepare a bed for her in the spare room; the bed was prepared, and she slept apart from her husband that night. That, on the following day, Mr. Burgess wrote a letter to Mrs. Barrett, Mrs. Burgess's mother, desiring her to come to his house, as a separation must take place between himself and his wife; that this letter was first shown to Mrs. Burgess, by her husband's direction, before it was forwarded. That, on the same day, Mrs. Burgess wrote a letter to Mr. Lane, which she read to the deponent; that it informed him, that there was to be a separation between her and her husband, but for what reason she could not tell, and requested him to find out from Mr. Burgess; that the next morning, Mrs. Burgess having written another letter to the same effect to Mr. Lane, an answer was received from him, while Mrs. Burgess, Mrs. Barrett, and witness were together; that Mrs. Barrett read it aloud, and the purport of it was, that he had seen Mr. Burgess, who appeared to him just as usual; that, at the bottom of it, there was something to this effect—"Has any thing transpired about Ryes?" That Mrs. Burgess sent a message the next morning, desiring to see her husband in her own room; that he went, and, after he had gone away, witness heard her telling her mother the particulars of the interview; that she stated, that her husband had charged her with having been guilty with Mr. Lane, and had added, 'I have seen Lane, he has confessed every thing, and by this time, I suppose, he has shot himself; you are the best judge whether what he has said is true;' and that she had thereupon told her husband, that whatever Mr. Lane had said was true."

This is a natural conversation. It is said, that it is denied by the mother, in her account of that conversation. The Court, however, cannot believe that the mother has actually stated all that passed in that interview—merely "that her daughter had informed her, that she had en-

treated her husband not to send her away, but he would not consent." It is impossible, that she should not inquire into the cause of her being so sent away. And then—"that she had satisfied her husband of her innocence, and that was enough, that no one else had a right to know any thing about it;" when it appears clearly, that he had not been satisfied, any further than that he had said "he would not expose her." With respect to the concluding part of this conversation, "that was enough," &c. how could it be considered *enough* for a parent, without knowing the cause, which led to such an imputation on her daughter's house! I think it is clear, that the mother's recollection must have been imperfect; and that, comparing the evidence of the maid-servant and Mrs. Barrett upon this point, the Court must consider that of the former as being the most to be relied upon, and the mother's account as unnatural, and to be attributed to a failure of memory.

It is said, that Mrs. Burgess had been entrapped into the confession which she had made. The Court recollects, that the admission of the articles, pleading this conversation, was opposed as irrelevant. (a) How is that consistent with the present supposition, that she was entrapped into it. It is said, however, that she had been entrapped by his telling her what was not true, and pretending that Lane had made a confession, when, in fact, he had not. Supposing this to have been an artifice to detect her—supposing it to be false—it would not detract from the effect of her confession, since, if false, what would have been the language of an innocent, and virtuous woman, under such an accusation? She would not have pleaded guilty. Would she not rather have repelled the charge, and inveighed against her traducer with animated indignation, and not have admitted the truth of it? I see no reason, however, to think that there was any such artifice practised. Then what has been the subsequent conduct of the parties? Lane went abroad. Could this be, if he was conscious that Mr. Burgess had unjustly traduced this lady, and that she had been entrapped into a confession, by a false assertion of a confession of his? Would he not feel himself bound to stay, to vindicate his character and her own? The letters, also, on the style of which

(a) On the admission of the allegation, which was opposed, the Court observed—This is an allegation, not in an original suit for adultery, but in bar to a suit for restitution of conjugal rights, on the part of the wife. In such a plea, the Court is disposed to allow some latitude, since it has not only to state the charges of accusation against the wife, but to account for the husband's conduct, in not bringing the suit earlier. Objection is taken to two articles only; the eleventh and the twelfth. On the eleventh, "that circumstances led the husband to suspect a criminal intercourse of his wife with Mr. Lane, and that he went to her, and she denied it; but that her conduct increased his suspicions; that he determined to separate, and wrote to her mother; that Mrs. Burgess wrote a letter to Mr. Lane, informing him of what had passed, which she first showed to her maid." The objection is, that part of this will be difficult of proof, and that the latter part is very slight. It may be so; but what the husband did may be explanatory of his conduct: and that she should write to Mr. Lane, was at least indelicate, unless in strains of indignation; and it may be very important to see what account will be given of it. In the 12th article it is pleaded, that Mr. Burgess charged Lane with the fact, and that he admitted it. It is objected, that this can be no evidence against her; and it certainly cannot be so used; but it is merely introductory of what follows—that Lane wrote to her, informing her of it, and that she showed the letter to her maid. It may be of consequence to know how she expressed herself on this occasion; there may be something of joint acknowledgment. It is followed by what is much stronger, in another article—that the husband informed her of Lane's confession, and that she admitted it was too true. By this acknowledgment she adopts it, which is the same as if she had confessed originally herself. The matter pleaded may be important, to show the meaning of the conversation between her and her husband; I therefore think, that the objections to the admission of this allegation cannot be sustained.—Objection over-ruled.

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it is unnecessary to comment, contain passages, which it is quite impossible, not to interpret as distinct admissions of detected guilt: they prove, in the clearest manner, guilt, submissive guilt, with as little merit of confession as can possibly be. No notice is taken of them in her responsive allegation; it is, however, attempted to give an explanation of her going to Mr. Lane's room; but no witnesses are examined upon it.

With regard to the confessions, they have been described, as if it was common for persons circumstanced as Mrs. Burgess was, to run from one extreme to another; that after strongly denying guilt at one time, yet afterwards feeling conscious of some little improprieties, they, in an agony of repentance, would confess more than was true. This is an hypothesis to which the Court cannot accede, as being contrary to its own experience, which has generally found persons prone to extenuate their faults, and willing always to take a lesser, rather than a greater, share of guilt than might be due to them. Again, it has been said, that the confessions were made under promises of forgiveness, and in the hope of inducing Mr. Burgess, by her repentance, to receive her again; but of this there is no proof whatever; for though the husband continued to live with her till the 7th of January, it was not till that time, that he had proofs of her actual guilt, when he had her confession and that of Mr. Lane; and a man cannot act on mere suspicion, as he would on full proof. The parties remained under private separation: She acknowledged that his conduct was generous, kind, and noble—What a return has she made for such conduct, and for having been spared the shame of a public exposure? She remains quiet for some months, till Mr. Lane goes out of the kingdom, and, when he is out of the way, she brings forward this suit of restitution of conjugal rights, and with these confessions of guilt staring her in the face, asks the Court to enforce a cohabitation for her, with her injured husband. Not content with this, she throws into the interrogatories, imputations on his character, which are totally unfounded in fact; whilst his only fault appears to be that of having placed too much confidence in her, who deserved none.

I am of opinion, that the evidence establishes not only moral, but judicial proof of guilt, that fully entitles the husband to the sentence which he prays.

Affirmed, on Appeal, Arches, 4th June 1818; Delegates, 15th November 1819.

SULLIVAN v. SULLIVAN, falsely called OLDACRE.—p. 238.

Nullity of marriage, by reason of publication of banns in false names, not supported in fact.

1818.291. LADY HERBERT v. LORD HERBERT.—p. 263.

1818.2. Validity of a marriage, celebrated at Palermo according to the law of Sicily, established.
363-7.

THIS was a suit for restitution of conjugal rights, brought by the Hon. Octavia Herbert, commonly called Lady Herbert, of the Parish of St. Mary-le-bone, against the Hon. Robert Henry Herbert, commonly called Lord Herbert, on a marriage alleged to have been celebrated between them, at Palermo, in the island and kingdom of Sicily: After the proceedings, stated below, on the part of Lord Herbert, a general negative issue was given to the libel, thereby denying the marriage; and as it was not a public and regular marriage, it was the object of the proceedings to prove the fact, and the validity of the marriage by the law of Sicily.

When the usual citation had been returned, with certificate that the party was not found to be served, &c. a further citation *viis et modis*, was issued, and returned, and a decree obtained calling on the party to appear, and see proceedings, with intimation that the Court would proceed on non-appearance: a libel was then offered, and was about to be read *in pœnam*, when a proctor asserted, that he gave an appearance, under protestation to the jurisdiction of the Court, on the ground, that the house, at which the citation had been served, did not belong to Lord Herbert at that time, &c.

The Court was disposed to overrule this application; when Dr. Arnold and Dr. Swabey, on the part of Lord Herbert, submitted, that he was entitled to be heard, on the authority of the case of *Buller v. Dolben*, Arches, 1756, in which there was an appearance under protest, and Sir George Hay overruled the protest, the party not being ready, and the excuse frivolous;—on appeal to the Court of Delegates, it was held, that the party ought not to be precluded from being heard.

The Court said—That in deference to that authority, it would not refuse to hear Lord Herbert, though the matter of fact, now suggested, being in contradiction of the fact on which the citation *viis et modis* had issued, ought to have been brought forward on affidavit: that there was the appearance of delay on the part of Lord Herbert, and it would be the duty of the Court to prevent Lady Herbert from receiving any prejudice. It would, therefore, permit the witnesses to be examined, *de bene esse*, during the long vacation. Dr. Arnold and Dr. Swabey suggested, that what was done before the party appeared would be a nullity. The Court thought, it was competent to direct the witnesses to be examined, as it had intimated; though the libel was not admitted, and the husband had appeared under protestation.

From this decree there was an appeal to the Court of Arches; but a caveat having been entered against the issuing of the inhibition, the case was argued in the Court of Arches on that point, when the Court held, that it had a discretionary power in granting inhibition, for purposes of justice, under particular circumstances, although it would be extremely reluctant to interfere with the ordinary course of appeals, and relied on the provisions of the 96th and 97th Canons to that effect. On reference to what had passed in the Consistory Court, the Court held, that the Judge was competent to order the examination of witnesses to proceed, *de bene esse*, on the libel, as had been directed in the Court below; and on further discussion of the facts, sustained a caveat, and directed the inhibition not to issue. The proceedings were then continued in the Consistory Court; and the evidence having been taken, by commission, in Sicily: on the 3d of February 1819, an objection was taken to the form, in which the examinations had been there conducted, principally

on the ground, that the directions from this Court were "*secretly and diligently to examine;*" and that the examinations had not been taken *secretly*, but in the presence of Don Camillo Gallo, the substitute of the proctor for Lady Herbert. To this it was replied, "That the requisition was executed, in every respect, in entire conformity with the subsisting laws at Palermo, and according to their best understanding of the terms thereof."

JUDGMENT.

SIR WILLIAM SCOTT.

The present question arises on an objection to the return, made to a requisition for examination of witnesses abroad; and it is concluded, that enough appears, on the face of the return, and on the protests accompanying it, to induce me to quash all the proceedings under the requisition, without so much as inspecting the depositions. After the length of time that this cause has been depending, and after the various obstructions, which have so long prevented its being brought to a close, the Court would greatly regret being under the necessity of protracting it still further, by acceding to the prayer which is now made. However, if the objection be of sufficient weight, the Court will be bound to act accordingly.

The case turns on a marriage, alleged to have been contracted between these noble persons, in the kingdom of Sicily; and great part of the evidence being to be sought there, it became necessary, according to the practice of this Court, to take out a requisition for the examination of witnesses. This instrument therefore issued. It was couched in the usual terms and addressed to his Britannic Majesty's Consul General in the Kingdom of Sicily, and to the civil and ecclesiastical magistrates of that country generally. The Consul accepted the requisition, and so did a Judge of the Supreme Court of Judicature in the island; and they appear to have proceeded with great deliberation in the business, having occupied several days in the examinations, which are transmitted to this Court, with a formal return or certificate of the execution of the commission.

Several objections appear to have been taken in Sicily, but these are all dismissed, as irrelevant and immaterial here, one only excepted; namely, that the examination was not conducted according to the tenor of the requisition. It is urged that the execution of the instrument ought not to have taken a wider latitude, than the instrument itself authorized and directed to be taken; that by the tenor of the commission, the witnesses should have been examined secretly; but that the fact was not so; for that one Signor Gallo, the person who acted in Sicily as the substitute of Lady Herbert's proctor, was present at the examinations; and that this is such, and so important a deviation from the tenor of the requisition, as to vitiate all the proceedings which have been had under it. On the other hand, it is not denied, that some error has crept into the execution of the commission, but it is said to be unintentional in its origin, and trivial in its effect. Certainly, if the Court saw any reason to apprehend, that an error, in the execution of the power delegated to the authorities in Sicily, was likely to lead to important consequences in the ultimate result of the suit, it would use every precaution against those consequences: but if the irregularity has arisen from the mere mistake of a word, easily misconceived, in the requisition, the Court would depart from its duty, if it did not, at least, inspect the depositions, and see

whether that irregularity had really led to the consequences suggested. The requisition directs, that the witnesses should be examined *secretly*. Such is the general rule both of the civil and canon law. Our own municipal law adopts a different mode of proceeding, by *viva voce* examination of witnesses in open Court; but the former mode is not only practised in the Ecclesiastical Courts of this country, but in the tribunals of all those countries, where the ancient civil and canon law has been received in practice.

It must be observed, however, that the *secrecy*, prescribed by the general rule, is very much varied by local regulations: the original law is modified in different countries. Strictly, and originally, the witness was examined by the Judge himself, taking to his assistance a notary to reduce the deposition into writing, but no one else being present. *Here*, in the Ecclesiastical Courts of this country, the examinations are taken by a practitioner, who represents the judge, a notary, who reduces the deposition, and who remains quite alone with the witness. In the present case, the execution of the commission, in Sicily, was effected in a more dignified manner, so far as regards the persons who took the examination. The Court, therefore, has some security, from the station, character, and functions of the Commissioners, that there was no intentional irregularity. I must admit, that, supposing the word *secretly*, in the requisition, had been well understood by the Commissioners, in the sense given to it in our practice, they ought to have executed it according to the law from which they received this delegated authority; for, having accepted such a delegation from a foreign country, they were not to act under it in a manner which that law could not recognize; and it is not sufficient to say, that they acted according to the law of Sicily.

I accede, however, entirely to the remark of Lady Herbert's Counsel, that the word *secretly*, is a word, in some degree, ambiguous; for there are different degrees of secrecy in the examination of witnesses, adopted in different countries. It may be considered as a *secret* examination, where the proceeding is merely *januis clausis*, with closed doors, the public being excluded; but the parties, or their representatives, being present; or it may be, where the Judge and notary only are present, or where the notary alone acts as an examiner. Now, if the mode in Sicily is to proceed, in such matters, *januis clausis*, the Commissioners might well construe the word *secretly*, as they appear actually to have done, giving equal permission to the substituted proctors of both parties to be present. Whether it might not be advisable, in future commissions for the examination of witnesses abroad, to throw in some explanatory words, specifying the sort and degree of secrecy intended, is a question which I need not now examine; but as this commission stands, I think the proceeding of the Commissioners has originated in a mere misapprehension, and a misapprehension in itself very natural; and that it affords no ground whatever for suspicion of intentional irregularity. The mistake was a mistake on all sides. The substituted proctor of Lord Herbert did not understand the word *secretly*, as we apply it in practice. In his protest he asserts, that he himself ought to have been present, and to have been present alone, which would have been equally at variance with our rule. Where all parties laboured under a common error, it is impossible to infer any impurity in the proceeding; nor do I, at present, see any suffi-

cient reason for rejecting the evidence. The Court, therefore, overrules the protest.

On this day, the cause came on again upon the merits, when it was argued by Dr. *Phillimore* and Dr. *Lushington*, on the part of Lady Herbert; and by Dr. *Arnold* and Dr. *Swabey*, on the part of Lord Herbert.

JUDGMENT.

SIR WILLIAM SCOTT.

This is a suit brought by the Dowager Princess of Butera of Sicily, against Lord Herbert, both of the persons being of noble birth and rank in their respective countries, and both of age at the time of the marriage, and, consequently, appearing in their own persons. It appears that Lord Herbert was in Sicily in 1814, and was introduced to the family of the Prince of Butera, the then husband of this Lady, whose house was much frequented by the English nobility and gentry there resident. Lord Herbert was received by them both with peculiar kindness and hospitality; and, the husband dying early in June, of that year, Lord Herbert began to pay particular attentions, of a very marked nature, to the Lady, in her widowhood. Her sister, who was the Duchess di San Giovanni, speaks to meeting him at her house, when he opened his arms to salute her, and on expressing her astonishment, he replied, "that he thought he was entitled to that indulgence, as he was about to become her brother-in-law." This led to further conversation, in which he declared his eager expectation of marriage, and showed her a written promise to that effect. It appears, however, that some friends of the lady entertained doubts as to the propriety of this marriage; as one of the witnesses says, that in a conversation with her, he advised her not to marry, as it might not be altogether suitable to her; but observed, at the same time, that it was a point for her to decide.

The intimacy of mutual affection continued to increase, with strong declarations of a desire to marry, on the part of Lord Herbert; and on the 17th of August, the marriage took place, certainly not conformably, in point of mere ceremonial regularity, to the matrimonial rites of that country; in which, as in most other countries of Europe, a solemn ceremony is appointed to be observed. But, it appears, that the Priest of the Parish was sent for, and that two servants of the family were present; and that the Lady, and Lord Herbert, in their presence, declared themselves to be husband and wife.—It is said, in objection, that this was an unsolemn marriage, and so it was; but it was followed up by all the necessary forms of registration, and by other acts; and nothing was left undone by which the fact could be established, as having actually taken place.

This part of the case being fully proved, the only question which remains, is respecting the validity of this fact of marriage: whether, celebrated in this form, it is invalid, according to the law of the country; it being the established principle, that every marriage is to be universally recognized, which is valid according to the law of the country in which it was had, whatever that law might be. On that point, witnesses have been examined in the usual way of proving that fact, by the judg-

ments of the professors of that law(*a*), producing the law, and showing that it is the existing law, according to their opinions. They state, with great distinctness and confidence, that the Council of Trent is the law of Sicily, which requires the presence of the parish priest and two wit-

(*a*) The eighth article of the libel pleaded, "That by the laws, customs, and constitutions prevailing throughout the whole island and kingdom of Sicily, and especially by the decree of the Council of Trent, A. D. 1563, which is received and obeyed as law at Palermo, and throughout all Sicily, and which was in full force there on the 17th August 1814, clandestine marriages are held to be valid. It is enacted, that the mutual and free consent of the parties contracting marriage, expressed and declared in the presence of the priest of the parish in which the parties, or one of them, resides, and in the presence of two witnesses, is sufficient to constitute the indissoluble bond of matrimony, and a man and woman thus married, are held to be legally united in wedlock; and so much was and is well known to the judges and advocates and lawyers presiding and practising in the courts of law at Palermo, or other places in the island and kingdom of Sicily, of the greatest reputation for their skill and knowledge in the laws of that country, and is in strict conformity with the exposition of the law of marriages in that kingdom, as laid down in the writings of authors of the greatest eminence and authority on that subject."

Ninth—"That several ordinances have, from time to time, been promulgated, by royal authority, in Sicily, which affix a civil punishment on persons contracting clandestine marriages, and render the husband, if the parties are of noble birth, liable to imprisonment for five years in a fortress, and the wife to confinement, for the same number of years, in a convent; but that these ordinances are never enforced, except at the suit of the parents or guardians of the parties clandestinely married; and it is the general usage of the King, at the petition of the husband or wife thus clandestinely married, to direct the Supreme Court of Judicature to remit the execution of the law, or to mitigate the severity of it; but that in no wise, by these proceedings, or by any other regulations imposed by the civil and canon laws prevailing in Sicily, is the validity of a clandestine marriage solemnized in the manner pleaded, ever affected or called in question: but the parties thus married are held to be validly and indissolubly united."

Tenth—"That the Honourable Robert Henry Herbert, commonly called Lord Herbert, and the Honourable Octavia Herbert, commonly called Lady Herbert, having mutually and freely expressed their consent to be married, and having been married, and pronounced husband and wife, by the priest of the parish in which they or one of them resided, in the presence of two witnesses, were and are lawful husband and wife, according to the laws of Sicily."

Four eminent advocates were examined upon these articles, and deposed to the same effect, as follows:

Don Domenico Mastrantonio, domiciled and resident in Palermo, doctor of both laws, and fiscal advocate of the High Archiepiscopal court of the city of Morreate, to the eighth article of the libel deposes, "That a clandestine marriage, although illicit by the laws of the church, is, notwithstanding, valid and indissoluble. This point was fully established by the Council of Trent, Sess. 24. c. 1. De Reformatione. Since this decree, no law has been enacted repugnant thereto; on the contrary, the said Council, with a view of obviating all judicial contests, threatened with excommunication all those who should call such decree in question. *'Dubitandum non est, clandestina matrimonia libero consensu contrahentium facta, rata et vera esse matrimonia, quamdiu ecclesia ea irrita non fecit, et proinde jure damnandi sunt illi, ut eos synodus anathemate damnet, qui ea vera et rata esse negant. Quique falso affirmant matrimonia a filiis familias sine consensu parentum contracta, irrita esse, et parentes ea rata vel irrita facere posse.'* This decree of the Council was received and adopted in Sicily, by an ordinance of the then King Philip the Second; and is the only source of sound doctrine, by which all the episcopal and royal courts of judicature are regulated and governed in matrimonial causes.

"A clandestine marriage is said to be contracted, when a man and a woman express and declare their mutual consent to contract matrimony, in the presence of the priest of the parish, or other minister by such parish priest for that purpose duly authorized and empowered, and in the presence of two witnesses. It is sufficient that the minister be the priest of the parish in which one of the parties reside. A marriage so contracted, is called a clandestine marriage, as being unaccompanied by the following solemnities; viz. three previous proclamations during the solemn mass of the parish, on three distinct festivals or holidays, and the benediction of the minister of the parish: and it is the want of this solemnity which occasions it to be designated as illicit. This marriage

nesses. The Court has the depositions of four professors of the law, declaring that they have no doubt whatever of the validity of a marriage so celebrated as this is proved to have been; and, indeed, the counsel here have felt, that, on this evidence, the validity could not be resisted.

It is scarcely necessary to advert to subsequent circumstances; but there is the correspondence of the parties, in the characters of husband and wife; letters of Lord Herbert, in the warmest terms of marital affection and acknowledgment, and a matrimonial cohabitation is fully proved for some days afterwards.

It appears, however, that there is in Sicily, a municipal and criminal law, against clandestine marriages, which subjects parties to imprisonment: the husband, if noble, in a fortress—the wife, in a convent; and there was a seclusion of these parties from each other, in consequence of this law; but not precisely, as the law prescribes, by close imprisonment. This is a law which appears to have been much dormant in the execution, and, I suppose, it is generally enforced only on the application of the friends of the parties; though I do not see, that the application of the family would be particularly necessary, as any other information given to the authorities, would probably be sufficient; or the government of the country might act upon its own motion: yet it is likely enough, that no such interposition of government is given, except when

is, notwithstanding, valid, and the union between the parties indissoluble, provided their mutual consent be expressed and declared in the presence of the priest of the parish and two witnesses, as above mentioned.”

To the 9th article—“That various civil ordinances, conformably to the provisions of the canon law, declaring the above-mentioned clandestine marriage to be illicit only, have been promulgated in our kingdom, which inflict a punishment on persons contracting such marriages, and, amongst others, the Pragmatic Sanction of the reigning King Ferdinand, vol. iv. tit. ‘De Delictis,’ which, not at all affecting or calling in question the indissolubility of clandestine marriages, but, on the contrary, respecting the same as a sacrament, merely prescribed, that the parties guilty of such an illicit act should be subject to punishment, which, for parties of noble birth, renders the husband liable to imprisonment for five years in a fortress, and the wife to confinement, for the same period, in a convent. Should the parties, however, be of ignoble birth, the husband is liable to banishment for five years, and the wife to imprisonment, in a solitary retreat, for the same period. The rigour of this law, however, has been repeatedly suspended by his Majesty, when no persons have appeared to denounce the parties, or enforce the execution of such law.”

To the tenth article—“That the Honourable Robert Henry Herbert, commonly called Lord Herbert, and the Honourable Octavia Spinelli, Princess Dowager of Butera, commonly called Lady Herbert, having expressed and declared their mutual consent to become husband and wife, in the presence of the priest of the parochial church of La Kalsa, (in whose district the palace, wherein the Princess Dowager of Butera at that time resided, is situate) and in the presence of witnesses, as pleaded, I am decidedly of opinion, that, by the laws of the church, and more especially according to the Council of Trent, and the civil law, they were and are lawful husband and wife, and indissolubly united in the bond of matrimony.”

The same witness, upon interrogatories—“That, according to the decrees of the Council of Trent, it is not necessary to the validity of a clandestine marriage, that the priest or minister of the parish should pronounce any words, prayers, or benediction, the presence of the priest of the parish alone being sufficient—that it is not necessary, that the witnesses should utter or pronounce any words indicative of their being witnesses to such marriage—that it is not necessary to obtain their consent, for intervening as such, on occasion of the celebration of a clandestine marriage—that the priest or minister of the parish ought to know, at the time of contracting such marriage, the names and surnames of the witnesses present—and that it is customary for either the intended husband or wife to furnish him with such information on the spot, or to leave the same with him written down on a piece of paper.”

parents interfere for the protection of minors, or under other particular circumstances. Government was informed, in this case, by the application of Lord Pembroke, who was much dissatisfied with the marriage. Lord Herbert was sent to a fortress from which he escaped, and she to a convent, from whence she was released, on bail, to appear, if called upon; which she has not yet been, as the time is not quite expired, but will expire in the course of the present summer.

Under these circumstances, the Court is requested, on the part of Lord Herbert, not to pronounce for a sentence of cohabitation, to be enforced immediately, but to defer it till a distant day, that it may not interfere with the separation under the municipal law of Sicily, to which reference has been made. It is allowed, that there is no precedent for such a limitation to the ordinary decree of this Court. Is there any principle in support of it? That this Court should borrow the criminal law of Sicily, and incorporate it into its own rules; not at the suit of the friends, or of the government of that country, but of the party himself, the husband being equally, or perhaps principally, involved in these irregularities. If the Court should accede to this prayer, I think, it would undertake a task, to which it is not competent, in its own jurisdiction; and that it would act contrary to all principle, so to take up the criminal law of a country, which is almost obsolete there, and at the prayer of the *particeps criminis* himself. If it possessed such authority, it is to be observed, that the time for this punishment is almost elapsed.

On the whole of this evidence, I have no doubt that the lady is the lawful wife of Lord Herbert, and the Court is bound to direct, that he should receive her as such, and certify to this Court, by the first day of Michaelmas Term, that he has so done.

LADY KIRKWALL v. LORD KIRKWALL.—p. 277.

Divorce, by reason of the adultery of the Husband.—Connivance on the part of the Wife, from forbearance; not inferred.—Objection to libel *overruled*.

THIS was a question upon the admissibility of a libel, offered on the part of the Honourable Anna Maria Fitzmaurice, commonly called Viscountess Kirkwall, in a cause of divorce, instituted by her against the Honourable John Hamilton Fitzmaurice, commonly called Lord Viscount Kirkwall, by reason of alleged adultery.

In opposition to the libel, Dr. *Arnold* and Dr. *Burnaby* objected, that it did not plead the period, when the adultery first came to Lady Kirkwall's knowledge. It was pleaded, that the fact occurred in 1814, and subsequently, in London and its neighbourhood; and that she was resident in London during the whole time; but yet the suit was not brought until the latter end of the year 1816. It was, therefore, to be presumed, that she was cognizant of the adultery, and acquiescing in it, particularly as she was living in a state of voluntary separation from her husband.

Dr. *Swabey* and Dr. *Lushington*, in reply to the objection, contended, that the mere residence of Lady Kirkwall in London did not, necessarily, give rise to the inference, that she was cognizant of the adultery, as a large city was, of all places, the best adapted for carrying on

such an intercourse with secrecy; but were it otherwise, forbearance to a certain extent was justifiable, and even commendable on the part of a wife; and could not constitute any bar to the remedy which she might seek, after finding that her forbearance had been unavailing.

JUDGMENT.

SIR WILLIAM SCOTT.

In this case the libel pleads, "that Lord and Lady Kirkwall were married, by special licence, in August 1802, at Abergelly, in Denbighshire; that they lived together, from that time, until the year 1809, and had two children. A separation then took place, in consequence of some unhappy differences which had arisen between them; that Lady Kirkwall has since resided, in various places in London, apart from her husband." The libel farther pleads, "that, in the beginning of the year 1814, Lord Kirkwall formed a criminal intercourse with a woman of the name of Taylor, or Hankin, who lived in lodgings in Park Place, Grosvenor Square; and that he, from that time, was in the habit of visiting her there for criminal purposes." The libel then charges various acts of adultery to have been committed by them at those and other lodgings; and further pleads, "that about the same time, he formed a similar connexion with a married woman of the name of Webb, then residing with her husband; that he afterwards lived with her in various lodgings, and still continues to do so at lodgings in Margaret Street, Cavendish Square;" and it charges adultery between them at all those places.

57. 39. An objection is taken to the admissibility of this libel, on the ground, 35 x 2. 449. that it does not plead the period, when Lady Kirkwall first became acquainted with the fact of adultery, with which her husband is charged. The Court, however, is of opinion, that the objection is not sustainable, either in point of fact, or in point of law. It cannot assent to the inference, that Lady Kirkwall is to be presumed cognizant of the adultery, because she lived in London, where it took place; as a person, in this great city, moves in a state of comparative obscurity as to his actions, to what a person does, who lives in a less populous place, where his life is open to continual observation:—*Magna urbs magna solitudo*. 34. 319. There is nothing in the facts charged, to show, that Lady Kirkwall's suspicion must, of necessity, have been excited, or that the adultery might not have taken place without her knowledge: but supposing that she was acquainted with it, though a husband is bound to take prompt notice of the infidelity of his wife, and is liable to have his neglect of so doing urged against him, when afterwards seeking his legal remedy; yet this doctrine is not to be pressed against a wife, unless in very particular cases.

Even in the case of a husband, it is not invariably expected, that he should show the time when the charge first came to his knowledge. It might be prudent, and expedient for the success of his suit, that he should do so, but it is not absolutely necessary—something must be allowed to convenience. Certainly, a wife would not be justified in living in the same house with her husband's concubine, sharing the turpitude of his crime, and partaking of a polluted bed; but she might have a reasonable hope of his return to her society; and forbearance, under this *spes recuperandi*, has never yet been held to constitute a bar to her legal remedy, when every hope of that kind should be extinct. I, therefore, admit this libel to proof.

On the 13th of February 1818, the libel being fully proved, the Court pronounced, that Lady Kirkwall was entitled to a divorce, and decreed accordingly.

LORD HAWKE v. CORRI, calling herself LADY HAWKE.—p. 280.

Jactitation of Marriage.—Factum of Marriage pleaded, but not sustained in proof.—Effect of *imposition* of such celebration, if actually practised, *quære*. The Court ultimately declined to pronounce for Jactitation; it appearing to have been done, originally, with the permission of the party.

PROCTOR v. PROCTOR.—p. 292.

Divorce, by reason of adultery, barred by the *compensatio criminis*, committed even after the adultery of the defendant.—*Recrimination* sustained.

LAGDEN v. FLACK.—p. 303.

Subtraction of tithes.—Endowment.—Small tithes.—Exemptions over-ruled.

MORTIMER v. MORTIMER.—p. 310.

Divorce by reason of adultery: confession in *articulo mortis*, as then apprehended, afterwards retracted: effect, as pleaded. Objection over-ruled.—Cause ultimately settled by agreement.

THIS was a suit, brought by the wife, for a restoration of conjugal rights; in which an allegation was now offered, on behalf of the husband, pleading her familiarities with another man, and *her confession of adultery* with him. It further stated, that at the time of the confession, the husband not being able to prove an act of adultery, had not sued for a separation, and further alleging the specific charges of adultery, and that the adultery was carried on for a long time.

The facts alleged were these:—that in the year 1805, Mr. Mortimer married this lady, then a Miss St. Barbe; that they cohabited together until 1811; that in the year 1807, whilst living at Blackheath, they became acquainted with a Mr. W. A. Young, who subsequently was much at the house; but no suspicion of any improper conduct on his part then entered the mind of Mr. Mortimer. In August 1811, Mrs. Mortimer being attacked with a very alarming illness, voluntarily confessed to her husband, that she had some time before carried on a criminal intercourse with Mr. Young; and the same evening, after taking the sacrament, repeated the same confession to her sister-in-law. Mr. Mortimer, on receiving this intelligence, endeavoured to procure other proof of the fact, but could only ascertain that some familiarities had been seen to pass between the parties, but not sufficient, as he then thought, to enable him to obtain a legal divorce. On Mrs. Mortimer's recovery, her husband took her home to her father, and communicated to him the circumstances,

when it was mutually agreed that she should reside at her father's house, on an allowance from her husband of £100 a year, and articles of separation were accordingly drawn up, on which all parties continued to act, until the father's death, in 1816; subsequent to which Mrs. Mortimer instituted this suit against her husband, for restitution of conjugal rights.

Dr. *Burnaby* and Dr. *Lushington* opposed the admission of the allegation, on the ground that, independently of the confession of Mrs. Mortimer, the facts pleaded were not such as could afford any inference of criminality whatever; and therefore, if a divorce were to be pronounced upon proof of this allegation, it would in fact be a divorce on the mere confession of the party; but it is a known rule of the Canon Law, specifically set forth in the 105th Canon of the English Church, that marriages cannot be dissolved on the mere confession of the parties, otherwise it would be impossible to prevent the most gross collusion. That the confession was made when her mind was weakened by disorder, and may have been carried beyond the truth; and on her recovery she retracted it in great part, admitting only that she had been guilty of levities, not of actual criminality. Such a confession was of no avail to the other party, as nothing was a bar to a suit for restitution, which would not found a sentence of divorce. That as to the deed of separation, which was pleaded, the Court has always held, that such deeds did not alter the legal condition of the parties, and were never considered by this Court except as to alimony. As to the other facts, if the proof of them was too vague, nine years ago, to enable the husband to come into Court on the ground which he now assumes; the subsequent lapse of time must render that proof still more indistinct, and must make it more difficult for the wife to produce contrary proof in establishment of her innocence.

On the other side, Dr. *Jenner* and Dr. *Addams* contended, that, where the husband did not proceed originally, but was called upon for his defence against receiving his wife, a greater latitude of proof was allowed; or the wife might, by withholding her suit, till the witnesses against her were dead, defeat the just defence of the husband; that the rule, as to confession, was founded on the Canon Law, (X. 4. 19. 5. Glos.) and the words of it seemed to apply only to cases of divorce and nullity (Gib. Cod. 445. Oughton, t. 214): It would not, therefore, preclude the husband from the benefit of it, in resisting the prayer of the wife; that with respect to the inability to bring sufficient proof in 1811, as set forth in the allegation, it was introduced merely in explanation of the conduct of the husband, and would not preclude him from offering proof at the present time.

JUDGMENT.

SIR WILLIAM SCOTT.

This allegation is given responsively in a suit for restitution of conjugal rights, and besides the formal articles pleading admitted facts, (the marriage, the cohabitation of the husband and wife, and the intimacy formed by the wife with a Mr. Young, who resided near her husband's house at Blackheath,) it further pleads, in four articles, what I presume is intended as a defence against the application, and consists of a charge of adultery, which the husband proposes to establish against her. There is no prayer subjoined to the allegation; and the Court is left in the dark, so far as the allegation goes, with regard to its ultimate object; but I am led by the counsel to suppose, that it will be for a separation *a mensa et thoro*. If that be the intention, I have only to consider, whether the

facts alleged will support such a prayer. If they should appear to fail of answering such a purpose, it may then be time to consider the inferior purpose, of inducing the Court to refuse to lend its authority to the wife's application, for the return of her husband.

The first thing which the Court looks to, when a charge of adultery is preferred, is the date of the charge, relatively to the date of the criminal fact charged, and known by the party; because, if the interval be very long between the date and knowledge of the fact, and the exhibition of them to this Court, it will be indisposed to relieve a party, who appears to have slumbered in sufficient comfort over them; and it will be inclined to infer either an insincerity in the complaint, or an acquiescence in the injury, whether real or supposed, or a condonation of it. It, therefore, demands a full and satisfactory explanation of this delay, in order to take it out of the reach of such interpretations. The allegation before me is constructed with a view to this purpose of explanation; for it goes into a history of facts that led to the delay, and which, certainly, could not be all of them admitted, but for that purpose.—The fifth article pleads, first, an habitual intimacy between the parties, certainly of an unseemly kind, running over a great number of circumstances from 1807 to 1811.—It is said, that this imposes a great difficulty upon the defence of the wife, for that it is almost impossible for her to construct a defence against a charge of such extent. How is she to be able to frame her defence against time, so as to show the impossibility that such things could have taken place? The answer to that is, that if the charge is that of habit, and constant practice, it is just as easy to show the contrary, namely, that no such habit and practice existed. She can cross-examine his witnesses; and she may produce witnesses of her own, to prove, that there were no such evening walks, no such “chambering and wantonness,” in short, nothing that raised in the minds of the witnesses a surmise of any thing improper. But it is said, there is a particular fact charged in a very loose way as to time. It is pleaded to have happened in the latter end of 1810, “that the said Alexander Young and Frances Mortimer were alone together in an upper room of a certain house, and that the said Frances Mortimer was then observed to have her arm round the neck of the said Young, and to be kissing him.” She there can at least cross-examine. The Court will scrutinise with due strictness, and with fair allowance for all the difficulties of her case, and it might hardly deem such a fact, if it stood alone, sufficient to induce the Court to admit it; but after all, it is its duty to consider, how the delay originated, so as to produce this laxity in description of time, and whether she herself has not, in a great degree, created the difficulty of which she now complains.

The sixth article states a confession, and it is a confession of a very particularly accredited nature, precise in point of reference to time—extremely solemn in its form, and confirmed by acknowledgment and repetition. (a)

(a) The article states, “that, in the month of August 1811, she was attacked with a very alarming illness; that she gave birth to a male child; that her life was despaired of; and that she sent for her husband, and said, that she could not die happy without confessing, that she had, for some time, carried on a criminal intercourse with Mr. Young; that she then felt much easier, and received the sacrament; and being still apprehensive of approaching dissolution, she repeated the same confession to Mrs. C. Mortimer, her sister-in-law, and recalled to her memory a certain day in 1808, when the crime was first committed.”

Now, I need not observe, that confession generally ranks high, or, I should say, highest in the scale of evidence. What is taken *pro confesso* is taken as indubitable truth. The plea of "Guilty" by the party accused shuts out all further inquiry. "*Habemus confitentem reum*," is demonstration; unless indirect motives can be assigned to it. This confession, however, does not admit, either in its own immediate circumstances, or in any conduct of the party, the possibility of any such motives. It is wrung from her by the strong emotions of her own mind *in articulo mortis*, at a moment when her declaration, made even against others, much more against herself, would be received upon the footing of sworn testimony. It is made to the party injured for the exoneration of a loaded conscience. It is confirmed, at her own desire, by the most solemn act of her religion. It is repeated, some time afterwards, to another person interested in knowing it, and with a reference to circumstances within the knowledge of that person, which had occurred on the very day to which the confession carried back the criminal act.

Two objections, however, are taken; first, that confessions alone will not support a charge of adultery, though they would support charges of a higher nature, such as treason, murder, &c.; and it is certainly true, that such is the letter of the Canon which guides the proceedings of this Court, and such is the interpretation which it has received. The more rational doctrine perhaps is, that confession, proved to the satisfaction of the Court to be perfectly free from all suspicion of a collusive purpose, might be sufficient to found a prayer for mere separation *a mensa et thoro*; though not *pro dirimendo matrimonii vinculo*, so as to enable a party to fly to other connexions. The distinction is the more rational here; for certainly it would be a pretty harsh injunction of law to compel a man, whether he would or no, to live with a wife who had acknowledged her infidelity to his bed. And so the ancient Canon Law appears to have considered it, by recognising a difference of rule in the two different cases of absolute divorce, and of mere separation. (X. 4. 19. 5.) Such, likewise, is the distinction taken in the more ancient Canon of this country. (A. D. 1597.) But the Canon now established, (A. D. 1603. c. 105.) and as enforced by interpretations too literal and too numerous to be shaken, at this time of day, by any considerations of hardship (however justly urged), certainly has overlooked the distinction, and applied the rule indiscriminately to both cases: though Oughton (an authority of no mean consideration, in matter of practice, in this Court) very reluctantly, (Tit. 214.) if at all, submits to the construction; and appears to hold out, that if the Court, after all circumspection used, is satisfied of the sincerity of the confession, it ought to rest upon it as proof. In the present case the sincerity can be no matter of question. No motive of a desire *advolare ad alteras nuptias* can be suspected. She resists a separation at the very time; and what is she now attempting but to re-establish her rights in this very marriage? However, it is not necessary to pursue the matter further upon this objection; for the party, in this case, does not rest his demand upon a confession alone. He pleads facts, to be supported by the testimony of others; and if these facts are merely proximate to acts of adultery, they may yet supply all the legal defect of a solitary confession.

A second objection is, that this confession was retracted; and that it is so admitted to have been in the succeeding article. Now this, which

is argued to be a retraction, appears to me, on the contrary, to be little short of a recognition. It describes frequent intercourse unknown to the husband, as well at Mr. Young's house as at her husband's. It describes the unrestrained permission of indecent liberties with her person, and it then particularizes two occasions on which facts are described, which, it has been rightly observed, would have been considered by any accidental spectator, as direct proofs of the ultimate conclusion. It is rather too much for her to expect, that having advanced so very far as she did, the Court must stop short in its conclusions, at the exact point, where she chooses to stop short in her narrative. The Court must draw its consequences though she disowns them. Retraction is not the term that one can apply to such an admission, even if taken singly by itself, without being confirmed and enlarged, as it is, by all that had passed before in her more solemn and sincere admissions.

The seventh and eighth articles plead the circumstance which led to the deed of separation, and the deed is exhibited. The objection taken against these articles is, that deeds of separation are not pleadable in the Ecclesiastical Court; and most certainly they are not, if pleaded as a bar to its further proceedings; for this Court considers a private separation as an illegal contract, implying a renunciation of stipulated duties—a dereliction of those mutual offices, which the parties are not at liberty to desert—an assumption of a false character, in both parties, contrary to the real *status personæ*, and to the obligations which both of them have contracted in the sight of God and man, to live together “till death them do part,” and on which the solemnities both of civil society, and of religion, have stamped a binding authority, from which the parties cannot release themselves by any private act of their own, or for causes, which the law itself has not pronounced to be sufficient, and sufficiently proved. These Courts, therefore, to which the law has appropriated the right of adjudicating upon the nature of the matrimonial contract, have uniformly rejected such covenants, as insignificant as a plea of bar; and leave it to other Courts to enforce them, so far as they may deem proper, upon a more favourable view (if they entertain it) of their consistency with the principles of the matrimonial contract. As a plea in bar, therefore, this Court would be bound to reject it; but the truth is, that it is not offered here in that character. It is pleaded as a mere fact in the case, in a way historical and explanatory of the conduct of the parties; and in that character it is most material; for it contains a most satisfactory explanation of all the delay that is complained of, and likewise suggests very strong conclusions with respect to the truth of the facts charged upon the wife. It asserts, that the husband was prevented from instituting proceedings by not having other evidence of his wife's infidelity than her confession; or if he had more (such as he now engages to produce) under-rating in his own estimate the legal effect of it for obtaining a divorce. He communicated with her father, Mr. St. Barbe, “on her *misconduct*,” a private separation was agreed upon; and she returned to live with her father, under a certain provision of maintenance from the husband then agreed upon.

Now, nothing can be stronger to betray the real state of facts then existing, than that she should agree, and her father should agree, to a separation upon such a charge of *misconduct*, which could not have been, had it not been fully admitted in the consciousness of the one, and fully credited on the information received by the other. The feelings

of honour on the part of the wife, and of affection on the part of the father, must otherwise have rebelled against such a proposition, founded on such a statement. However, the separation actually takes place, and the matter in consequence slumbers, at least in all public form, for years, during the lifetime of the father. Upon his death the husband suffers it to remain on the same footing; not so the wife, for she then becomes the aggressor, and calls for a restitution of her conjugal rights; and when he objects to this demand, upon the charges, which, with her consent and her father's, had been suffered to lie so long dormant, she cries out against the difficulties she is laid under for her defence, by the delay of proceeding to which she was as much a party as himself; and he has to fight up against the deficiencies of proof, that the lapse of so much time may have produced. In all probability that delay has been full as favourable to herself as it could be to him, and she perhaps now proceeds in the confidence that such must be its effect.

I shall, therefore, admit this allegation to proof *in toto*; and, I think it not premature to say, that if it be proved to the extent in which it is laid, it will entitle the husband to a sentence of legal separation. What its effect may be as a mere bar to the present suit, if the proof falls short of that extent, I can better ascertain when I see how far it actually does fall short.

A counter-allegation was afterwards given in on the part of the wife, and witnesses were examined on both allegations. On 7th December 1821, the cause was ready for hearing, when it was settled between the parties, and both proctors declared, that they proceeded no further.

550. GUEST v. SHIPLEY, falsely calling herself GUEST.—p. 321.

52.408 Citation, in a suit of nullity of marriage, by reason of incurable impotence; not *sustained*: The complainant having confessed the validity of the marriage in former proceedings for divorce, by reason of adultery, against him.

In this case, a citation was taken out, calling upon the woman to answer, in a suit of nullity of marriage, by reason of impotence, by mal-conformation in her person: An appearance was given for her, under protest; on the extension of which, and the answer of the man, in an act of Court, the matter was argued by Dr. *Arnold* and Dr. *Adams*, for the woman; and by Dr. *Lushington*, for the man.

JUDGMENT.

Sir WILLIAM SCOTT.

This is a proceeding by Thomas Douglas Guest, to obtain a sentence of nullity of marriage, by reason of incurable impotence, arising from mal-conformation of his wife; a mal-conformation, which defeats the purposes for which the marriage contract is founded. Such cases are supposed to be physically possible, and the Court has occasionally received them; but, for reasons inherent in the nature of such causes, the Court is not disposed to encourage them, without an evident necessity; the proofs being such as are palpably against the modesty of the sex. In this case, it appears, that the parties were married in 1813; the wife had a considerable property, 14,000*l.*; of which 10,000*l.* was property reserved

to herself; as it does not appear, that the husband had any fortune. In the quality of her husband, under the marriage settlement, he has had the use of 4000*l.*, which furnishes a pretty strong inference, that there was no such objection to the marriage, as is now stated, since it is only in the character of a *lawful* husband, that he could entitle himself to the use of this money. It appears, that, within one month after the marriage, he was found by the wife in a situation with a maid-servant, whom he had introduced into her service, which, though it might not afford direct proof of adultery, was sufficient to raise her suspicion, and a suit was accordingly brought on the part of the wife. (a) The libel was given in after some time, which pleaded lawful marriage between the parties; and this plea was not opposed on the part of the husband. He had then the opportunity of controverting the fact, that he was not her lawful husband, on account of these natural obstructions, which would defeat the validity of the marriage; but he did not use that opportunity. His conduct, on that occasion, may be considered as an admission, that there was no such impediment to the marriage.

It is said, that the validity of the marriage was only an incidental point in such a suit, but it is the foundation of the whole proceeding. There can be no adultery, if there is no marriage; and it is always held, both here and at Common Law, that the first point to be proved is the marriage, which the other party may contest, and if he does not, the form of the sentence, in such cases, pronounces that there has been a true and lawful marriage, as well as a violation of it. I am of opinion, therefore, that this point has been an essential part of a suit, which this Court has determined; and that it is not in the power of the party now to bring it again before the Court, even if there was no other objection to it. But the length of time which has elapsed, is, in itself, almost a bar; for I do not remember any instance, in which such a suit has been allowed to be instituted, after such an interval. That a period of seven years should be allowed to elapse in a case, where even a very short cohabitation would have sufficed for the discovery, is not allowed by any principle of law with which I am acquainted.

It has been said, that all this arose from the forbearance of the man; that he has no intention of obtaining money from the wife as is suggested; but that he colluded in the former proceedings, and submitted to the sentence, on the engagement of the wife's proctor, that he should not be subject to the costs. This is positively denied by the practiser in this Court, and it is highly improbable, that any practiser of this Court should so have conducted himself. The denial is completely supported by a person who was present at a conversation, which occurred in a proper way, while he attended, at the office of the proctor, for the purpose of identifying the man. I am quite satisfied therefore, that there was no such engagement; if, however, the averment was true, it would be what he has now no right to allege, that he agreed to submit to a sentence, when he could have made a defence. The letters, which have been produced, contradictory to this, are of a *mendicant* kind; and there is also something of the appearance of threats, which forms part of the machinery in this shameful attempt to extort money. I am of opinion, that

(a) On 9th February 1816, in a suit of adultery brought by Mrs. Guest against her husband, an issue was given, confessing the marriage, otherwise contesting the suit negatively: Sentence was given in favour of the wife; and there was no appeal.

the wife has acted with becoming spirit in resisting such an attempt, and bringing this case before the Court.—I dismiss this suit with costs.

BRIGGS v. MORGAN.—p. 324.

[See the Report, 1 Eng. Eccl. Rep. 408.]

Nullity of marriage by reason of incurable impotence alleged against the wife, *not* sustained. The charge allowed to be repelled under the circumstances of *age*, &c. and by a denial, in the form of protestation, by affidavits.

The Office of The Judge promoted by

GILBERT v. BUZZARD and BOYER.—p. 333.

[S. C. 3 Phil. Rep. 335. 1 Eng. Eccl. Rep. 411.]

Right of burial, in imperishable materials; how far restrained by considerations of public convenience: *Patent Iron Coffins*, the subject of the present question, admitted at an increased rate of payment to the parish.

552, 9. BURN v. FARRAR, falsely called FARRAR.—p. 369.

Nullity of marriage alleged on the *lex loci* of France, on a marriage between English subjects, celebrated by the chaplain of the British forces, then in the occupation of the country. Libel admitted: Principal question reserved.

THIS was a case of nullity of marriage, instituted on the part of the wife, with reference to the circumstances of the marriage, as celebrated in France, by the chaplain of the British forces, under the Duke of Wellington, and not in conformity to the law of France, as pleaded and set forth. Upon admission of the libel *in pœnam*, no appearance having been given for the husband, Dr. *Swabey* described the nature of the case, as above stated, observing, that it would be, when proved, a legal ground of nullity; as marriage, like all other contracts, should be celebrated according to the *lex loci*.

JUDGMENT.

Sir WILLIAM SCOTT.

I shall admit this libel to proof, without deciding at present on the effect which it may have if proved; but merely to assist the party proceeding, in procuring, if possible, an answer to it from the opposite party. I have received several letters addressed to me by English clergymen, and others, in foreign countries, relative to marriages of this kind, which letters I have felt it to be my duty not to answer; as it certainly is no part of my public duty, to answer private inquiries upon questions, which may come judicially before me. Some of the marriages, which gave occasion to those letters, have been contracted under circumstances similar to the present; and it will be too much to expect, that I should instantly give a judgment upon such questions, in an undefended suit, and in which I can hear no argument in support of the validity of the marriage.

It appears, that the husband here was an officer of the army of occupation; and it may, therefore, very well be doubted, whether he was at all subject to the French law, as pleaded in the libel. I shall give no decided opinion on that point at present; but I shall admit the libel, in order that the party may be the better enabled to obtain an appearance, and bring the cause to a regular decision upon proper argument.

No further proceedings have taken place.

RUDING v. SMITH, falsely calling herself RUDING.—p. 371.

Nullity of marriage, alleged on the *lex loci* of Holland, as not conformable thereto, with reference to a marriage celebrated between British subjects at the Cape, by the chaplain of the British forces, then occupying that settlement under capitulation. Libel not admitted.

THIS was a case of nullity of marriage, brought by the husband, to set aside a marriage celebrated in a room in a private house, between the parties, being British subjects, at the Cape of Good Hope, on the 22d October 1796, by the Chaplain of the English forces, by virtue of a licence or permission from General Sir James Craig, the commander of the British forces at the said colony.

The libel pleaded the surrender of the Cape to the British forces in 1795, and the terms of capitulation, "that the inhabitants of the Cape should preserve their prerogatives, and the exercise of public worship, which they at present enjoy:" and that the laws of the United Provinces, which were in force at that time, had never been repealed or altered. It then set forth the law of Holland(*a*) respecting marriage,

(a) The fourth article of the libel pleaded, "that in and by the laws of the United States prevailing in the said settlement or colony, every marriage between persons who were respectively of the religion established by law within the said settlement or colony, must be celebrated in the parochial church of the parish in which one of the said persons resided, by the priest or minister thereof, otherwise the same would be void and of no effect: That in and by the said laws, every marriage between persons both or either of whom were dissenters from the religion established by law within the said settlement or colony, must be so solemnized or contracted before a magistrate at his ordinary place of session, otherwise the same would be void and of no effect; and the party proponent doth further allege and propound, that in and by the said laws no legal and valid marriage could be had or solemnized within the said settlement or colony, either between persons who were respectively of the religion by law established, or both or either of whom were dissenters from the same, without due publication of banns three several times, or without a licensee or dispensation from the same, granted by the supreme authority of the States, in whom the power of granting such licence or dispensation was exclusively vested, and that such licence or dispensation was never granted by the said supreme authority, for more than one or two of the said necessary publications of banns: That in and by the said laws, no man under the age of thirty years could lawfully contract marriage without the consent of his parent or parents, if living, first had and obtained, or if dead by his guardian or guardians lawfully appointed; and that no woman under the age twenty-five years, could lawfully contract marriage without the consent of her parents if living, or if dead, of her guardian or guardians lawfully appointed; and that all marriages, where the man was under the age of thirty years, or the woman under the age of twenty-five years, had and solemnized without the consent of the parents or parent, if living, or if dead, of the guardian or guardians lawfully appointed of the party so under the age of thirty or twenty-five years, were absolutely null and void to all intents and purposes in law whatsoever; and that no difference or exemption whatever was made or allowed for or on account of any person or persons whatever, being foreigners, or *in itinere*, or otherwise; but the same were binding upon all persons whatever, desirous of contracting matrimony within the said colony."

and alleged, That between persons both, or either of them, dissenting from the religion established by law, marriage must be solemnized or contracted before a magistrate, or otherwise the same would be null and of no effect; and that no exception was allowed for persons being strangers or foreigners. It then pleaded the principal circumstances in the situation of these parties, "that the wife was born at Fort Saint George, in India, in November 1777, and Mr. Ruding in 1774, in England: that they were resident at the Cape in September and October 1796;" and prayed, that the marriage being had in a private house, not in the parochial church, without banns or licence, and without consent of parents as required by the law of Holland, might be pronounced to be null and invalid.

17th July.
570, 11.
The admission of the libel was opposed by Dr. *Jennner* and Dr. *Philimore*—who submitted, that though the principle of *lex loci*, which was assumed in the libel, might be very just, as an affirmative position; it would not follow, that the converse of that proposition was true; that no marriage contracted in a foreign country could be good, unless it was solemnized according to the law of the place: That the general principle could not apply to persons being at the Cape, as British subjects, under the protection of the British forces, then in possession of the settlement, by virtue of the recent surrender; that such persons must be supposed to contract with reference to the law of their own country, according to the distinction maintained even by Huber(a), and admitted by Lord Mansfield in the case of *Robinson v. Bland*, 2 Burrows, 1077, that marriage is to be considered not so much with respect to the *locus contractus*, as of the place where it is to be exercised. That the terms of the capitulation might preserve to the inhabitants the enjoyment of their former laws, but it would be unreasonable to impose them as paramount authority on all English subjects, who might be with the British army in the condition of conquerors; that in Gibraltar, in the East Indies, and in other places, the exercise of particular religions is reserved to inhabitants; yet the marriages of English subjects in those places, under the English laws, had never been disputed.

485.
553 1/2.
In support of the Libel,—Dr. *Lushington* and Dr. *Dodson* contended,—That it had been established by the highest authority, that, in conquered countries, the laws remained in force, till altered by competent authority. *Calvin's case*, 7 Coke's Rep. 17, 18. That the authority of the laws, so continued, was binding on all persons; and there was no distinction as to contracts between natives, and strangers, except as to property situated in another country.(b) That it had been laid down in this Court, in the recent case of *Dalrymple v. Dalrymple*, supra, p. 485, that all persons contracting marriage are bound to celebrate such marriage according to the *lex loci*: it had been so held in older cases, in *Compton v. Bearcroft*, Deleg. 1769, and in *Ilderton v. Ilderton*, 2 H. Bl. Rep. 145; and the distinction now contended for, as to persons in the character of conquerors, could not be maintained. In *Burn v. Farrar*, ante, p. 550, which was a case of British subjects married

556.
(a) *Prælectiones Juris Civilis*.—De Conflictu Legum, l. 1. tit. 3. § 10.

(b) *Campbell v. Hall*, 1 Cowper, 208. On that subject, see also 2 P. Wms. 75. and the exception therein stated, "unless it be contrary to the Law of England, or *malum in se*, or an omitted case." And the very able argument of Mr. Nolan upon it in the case of Governor Picton, St. Tr. vol. 30. p. 833 et seq.

in France by licence, and permission of the Duke of Wellington, the Court admitted the libel; but intimated, that it was a question of moment, in which it was not disposed to proceed further in the absence of the husband, who was said to be gone to South America. If that marriage could be held good, it must be owing to the particular situation of the British armies in France: *There* was no conquest, and no natural communication with the civil authorities, nor opportunity of resorting to the tribunals of the country. In this instance, such a plea could not be advanced, as the laws had been recognized; and there was a special provision in those laws for the case of strangers, and dissenters from the religion of the place, by which the celebration of this marriage might have been had as easily, as by the mode which had been adopted. The principle of resorting to English law would carry with it a great inconvenience, as the law so imported, would be, not the present law of England, but such as had been in force seventy years ago. The case of British subjects in India was peculiar and *sui generis*; as they were exempted from the law of the country, and lived as persons in factories, under the faith of treaties, and the provisions of sundry charters and acts of parliament. In the case of *Middleton v. Janverin*, post. a 582. marriage solemnized in Flanders, but not according to the *lex loci*, had been set aside; and it was submitted on those authorities, that this marriage, being had without publication of banns, and without a licence from any competent authority, or according to the laws of Holland, was null and void.

In reply—Dr. Jenner and Dr. Phillimore—The proposition advanced on the other side, would amount to this, that officers serving in the British forces, at the surrender of the Cape, would be instantly subject to the laws of the conquered country, in all cases, and in all transactions, even between themselves,—which would be a manifest absurdity. That the general principle of the *lex loci* could not be applied universally as a negative proposition. It necessarily contained in it many qualifications and exceptions, as with respect to polygamy, and other customs, which could not be reconciled to the laws and the religion of this country. The present case also, necessarily formed another exception. The authority of the decision in *Campbell v. Hall* referred to persons settling in a foreign colony, and was not applicable to the question before the Court. Military persons, and others accompanying the military occupation, are to be considered in a different point of view; *with respect to such persons*, Voet, in Dig. lib. 23. tit. 2, and Huber, admit the distinction, that they must be understood to contract according to the laws of their own country; as an exception founded on the nature of their situation. In *Compton v. Bearcroft*, the question did not turn on the validity of the marriage by the law of Scotland, because nothing appeared respecting that law; the libel pleaded only the marriage act, and the nullity of the marriage as alleged, contracted by persons going to Scotland to celebrate a marriage there, in evasion of the law of their own country. The Court held, that the marriage act, in its terms, did not apply to Scotland, and could not be extended on the principle of evasion. On that ground it did not sustain the libel; but gave no opinion on the effect of the law of Scotland on that marriage, as that question had not been raised in the pleadings. (a) In *Dalrymple v. Dalrymple*, the 485.

(a) It appears from the argument in *Compton v. Bearcroft*, that, soon after the Mar-
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parties were inhabitants of the country, and one a native inhabitant. If Mr. Ruding had married a Dutch lady, it might, perhaps, have imposed on him an obligation to conform, in such marriage, to the laws of the settlement; and a departure from them might have been fatal. In *Middleton v. Janverin*, the marriage was designed to be according to the law of Austrian Flanders, without any intention to adhere to the British law.

COURT.—Could it be laid down conversely, that all marriages abroad according to the British law, would be good?

Dr. Jenner.—I will not undertake to offer an opinion on that point; as I do not feel myself called upon to maintain that proposition; at present, it may be sufficient to say, that there are no cases which establish the contrary: The present case rests on special grounds;—the impossibility of subjecting all individuals, accompanying a conquering army, to the laws of the conquered country. Among other requisites of the Dutch law, is the consent of parents, which must, in almost all such marriages, be impossible to be obtained, as it was peculiarly in the present instance, from the circumstances of the case.

JUDGMENT.

Lord STOWELL.(a)

This is a suit brought by Walter Ruding, Esq. against Jemima Claudia Smith, for the purpose of praying this Court to pronounce null and void his marriage had with that lady under the following circumstances:—She was born at Fort St. George, in the East Indies, in the month of Nov. 1777. His birth took place at Kineton, in the county of Warwick, on the 13th day of May 1774. In September 1796, she was at the Cape of Good Hope; the Cape had surrendered a year before: for what purpose she came thither, or how long she meant to remain, does not appear. At the same time Mr. Ruding came thither also, in his way to the East Indies, being at that time a captain in the 12th Regiment of Foot. On the 22d of October 1796, they were married by the chaplain of the British garrison, under the authority of a licence granted by General Craig, the commander in chief of the British forces in that country. When the marriage was performed, Mr. Ruding was of full age; but the lady was under the age of nineteen. The consent of parents or guardians, required by the Dutch law then generally prevailing at the Cape, was not obtained, as regarded either of the contracting parties. Her father had died some years before, and her mother had mar-

riage Act, many instances had occurred of persons going into Scotland, to evade the restrictions of that Act. The cases of *Bedford v. Varney*, 1762, before Lord Northington, and *Brook v. Oliver* at the Rolls, before Sir Thomas Clarke, 1759, were mentioned, being cases of bequests, dependent on the validity of such marriage, in which it had been contended, *that the marriage was not valid*; but the objection was over-ruled, and the points in those cases adjudged accordingly.—It was said also, that Lord Northington must have been well acquainted with the spirit and intention of that act, as he had been much concerned in procuring it.

The notion of impeaching those marriages, on the ground of evasion stated in the libel, is there supposed to have proceeded from the observations of Lord Mansfield, in *Robinson v. Bland*, as to the exception that might be admitted in such cases on that principle, as suggested by Huber.

(a) On the 14th of July, Sir Wm. Scott was created a Peer of the United Kingdom of Great Britain and Ireland, by the title of Baron Stowell, and on the 14th of August resigned the chair of the Consistory Court. He was succeeded by Sir Christopher Robinson, L.L.D. His Majesty's Advocate General.

ried a second husband; and no appointment of guardians had taken place. It is contended by the husband, that by the Dutch law at that time in force at the Cape, this marriage was null and void: and on that ground he seeks the aid of this Court, to pronounce a sentence declaratory of its nullity.

The case of facts which I have stated, and the Dutch law under which, if applied to these facts, the marriage is to be invalidated, are pleaded in the libel; and I think that there is little doubt, that the Dutch law, with respect to persons to whom it really applies, is fairly represented, and would be so proved if the libel was admitted. As little doubt is there, that the facts of the case would be established by clear proof; but the real question is, whether the Dutch law, so pleaded, ought to govern entirely and exclusively, this case of fact applying to these individuals? For if it ought not, the libel, which rests the case upon it, ought not to be admitted.

In order to maintain that the Dutch law ought to govern the case, the party pleads, first an article in the capitulation, under which the Dutch colony was surrendered to the British arms. That stipulation covenants, that the inhabitants shall *preserve the prerogatives which they enjoy at present*. The meaning of this article, be it what it may, for the term used "*prerogatives*" is sufficiently indefinite and obscure, can never be extended to the British conquerors, *ex vi terminorum*. They are the grantors, not the grantees. They were not in the enjoyment of any prerogatives whatever under the Dutch law; they had nothing under it which they could wish to preserve. It is impossible that the Dutch could intend to stipulate for them. It has, therefore, I think, been nearly admitted, that as to the British conquerors, this article has no intelligible application; consequently, if the Dutch law binds them, it must be by some other obligation, by which, independent of this article of capitulation, the Dutch law imposes itself upon them. In order to bring it a little nearer, after pleading in the following articles what the Dutch law of marriage is, it is stated also, "that that law binds *all persons whatever within the colony*, foreigners as well as natives, for that their laws say so, and that their learned lawyers will support that doctrine, and that their courts will enforce it." Now, if that be true, that the law binds the British conqueror immediately upon the capitulation, (there being no express covenant to that effect) it must be either from some known rule of the Law of Nations, which subjects the conquerors to the laws of the conquered, or from some peculiar principle of the law of England, which imposes such an obligation upon the British conquerors of the possessions of the enemy; for clearly the Dutch law, taken by itself, cannot directly, and by its own force, bind them. Dutch authority could not impose it, for Dutch authority had ceased; and a Dutch Court, taking upon itself to force this law upon British parties only, and in transactions purely British, might be thought to put forward no very just or moderate pretension; unless some authority, superior to it, had imparted to it a force, which it did not itself directly possess. Such an authority, if it exists at all, must be found either in the Law of Nations, or in the British law, for no other authority could give it. I am not aware that any such principle or practice exists in the general law of Nations. It sometimes happens, that the conquered are left in possession of their own laws—more frequently the laws of the conquerors are imposed upon them; and sometimes the conquerors, if they

settle in the country, are content to adopt for their own use such part of the laws, prevailing before the conquest, as they may find convenient, under the change of authority, to retain. I presume, that there is no legal difference between a conquered country and a conquered colony in this respect, as far as general law is concerned; and I am yet to seek for any principle, derivable from that law, which bows the conquerors of a country to the legal institutions of the conquered. Such a principle may be attended with most severe inconvenience in its operation. The laws may be harsh and oppressive in the extreme; may contain institutions abhorrent to all the feelings, and opinions, and habits of the conquerors: at any rate they can be but imperfectly understood; and that they should all of them instantaneously attach, and continue obligatory upon them, till their own government had time to learn them, and select and correct them, is a proposition which, I think, a professor of general law would be inclined to consider cautiously, before it could be unreservedly admitted.

But it is argued to be the doctrine of the law of England; if so, it is not the less hard, as the municipal code of our country is generally admitted to be more liberal, and more indulgent, than the codes of most other countries. It would be a most bitter fruit of the victories of its subjects, if they were bound to adopt the jealous and oppressive systems of all the countries, which they subdued, and to groan under all the tyranny,^(a) civil and ecclesiastical, of those systems, till their own government, occupied by the pressure of existing hostilities, had time to look about, to collect information, and to prescribe rules of conduct more congenial to their original habits. To learn what the laws of a country are, is not the work of a day, even in pacific times, and to persons accustomed to legal inquiries; and to construct a code, fit for such a new and mixed situation of persons and things, demands, not without reason, a very serious *tempus deliberandi*; and conquerors are, certainly, not the last men, who are entitled to the protection of their country under new grievances.

I am perfectly aware, that it is laid down generally, in the authorities referred to,^(b) "that the laws of a conquered country *remain*, till altered by the new authority." I have to observe, first, that the word *remain* has, *ex vi termini*, a reference to its obligation upon those, in whose usage it already existed, and not to those who are entire strangers to it, in the whole of their preceding intercourse with each other. Even with respect to the ancient inhabitants, no small portion of the ancient law is unavoidably superseded, by the revolution of government that has taken place. The allegiance of the subjects, and all the law that relates to it—the administration of the law in the Sovereign, and appellate jurisdictions—and all the laws connected with the exercise of the sovereign authority—must undergo alterations adapted to the change. This very libel furnishes instances of this sort. In the third article it is stated, "that dispensations from the publication of banns must be had from the authority of the States of Holland." That, I must presume, could not be continued during the existence of the war, and the extinction or suspension of the sovereignty of that nation. But, se-

(a) See on this point the argument in the case of Governor Picton, St. Tr. vol. 30. p. 833 et seq., and note *supra*, p. 552.

(b) *Cabrin's case*, 7 Coke's Reports; and *Hall and Campbell*, Cowper, p. 208.

condly, though the old laws are to remain, it is surely a sufficient application of such terms, "*that they shall remain in force*," if they continue to govern (so far as they do continue) the transactions of the ancient settlers with each other, and with the new comers. To allow that they shall intrude into all the separate transactions of these British conquerors, is to give them a validity, which they would otherwise want, in all cases whatever.

It is certainly true, that in *Hall* and *Campbell*, that most eminent Judge, Lord *Mansfield*, a person never to be named but with accompanying expressions of reverence, has laid down the following proposition: "That the law and legislative government of every dominion, equally *affects all persons*, and all property, within the limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privileges distinct from the natives." *Huber*, too, speaking upon general principles, had before promulgated the same doctrine:—"Pro subjectis imperio habendi sunt omnes, qui intra terminos ejusdem reperiuntur, sive in perpetuum, sive ad tempus ibi commorantur." De Conflict. Leg. l. 1. t. 3. § 2. But to such a proposition, expressed in very general terms, only general truth can be ascribed; for it is, undoubtedly, subject to exceptions.

It is not to be said, that ambassadors and public ministers are subject to the whole body of the municipal law of the country, where they reside. They belong, in great part, to the country which they represent. Even the native and resident inhabitants, are not all brought strictly within the pale of the general law. It is observed by the learned Dr. *Hyde*, that there is in every country, a body of inhabitants, formerly much more numerous than at present, (and now generally allowed to be of foreign extraction) having a language and usages of their own, leading an erratic life, and distinguished by the different names of *Egyptians*, *Bohemians*, *Zingarians*, and other names, in the countries where they live: Upon such persons the general law of the country operates very slightly, except to restrain them from injurious crimes; and the matrimonial law hardly, I presume, in fact, any where at all. In our own country and in many others, there is another body, much more numerous and respectable, distinguished by a still greater singularity of usages, who, though native subjects, under the protection of the general law, are, in many respects, governed by institutions of their own, and, particularly, in their marriages; for it being the practice of mankind to consecrate their marriages by religious ceremonies, the differences of religion, in all countries that admit residents professing religions essentially different, unavoidably introduce exceptions, in that matter, to the universality of that rule, which makes mere domicile the constituent of an unlimited subjection to the ordinary law of the country. The true statement of the case results to this, that the exceptions, when admitted, furnish the real law for the excepted cases; the general law steers wide of them. The matrimonial law of England for the Jews, is their own matrimonial law; and an English Court Christian, examining the validity of an English Jew marriage, would examine it by that law, and by that law only, as has been done in the cases, that were determined in this Court on those very principles, (*supra*, pp. 367. 442.) If a rule of that law be, that the fact of a witness to the marriage having eaten

prohibited viands, or profaning the Sabbath-day, would vitiate that marriage itself, an English court would give it that effect, when duly proved, though a total stranger to any such effect upon an English marriage generally. I presume, that a Dutch tribunal would treat the marriage of a Dutch Jew in a similar way, not by referring to the general law of the Dutch Protestant Consistory, but to the Ritual of the Dutch Jews established in Holland.

What is the law of marriages, in all foreign establishments settled in countries, professing a religion essentially different? In the English Factories at Lisbon, Leghorn, Oporto, Cadiz—and in the factories in the East; Smyrna, Aleppo, and others? in all of which, (some of these establishments existing by authority under treaties, and others under indulgence and toleration) marriages are regulated by the law of the original country, to which they are still considered to belong. An English resident at St. Petersburg does not look to the Ritual of the Greek Church, but to the Rubric of the Church of England, when he contracts a marriage with an English woman. (a) Nobody can suppose, that whilst the Mogul empire existed, an Englishman was bound to consult the Koran, for the celebration of his marriage. Even where no foreign connection can be ascribed, a respect is shown to the opinions and practice of a distinct people. The validity of a Greek marriage, in the extensive dominions of Turkey, is left to depend, I presume, upon their own canons, without any reference to Mahometan ceremonies. There is *ajus gentium* upon this matter,—a comity, which treats with tenderness, or at least with toleration, the opinions and usages of a distinct people in this transaction of marriage. It may be difficult to say, *a priori*, how far the general law should circumscribe its own authority in this matter; but practice has established the principle in several instances; and where the practice is admitted, it is entitled to acceptance and respect. It has sanctioned the marriages of foreign subjects, in the houses of the Embassadors of the foreign country, to which they belong: I am not aware of any judicial recognition upon the point; but the reputation, which the validity of such marriages has acquired, makes such a recognition by no means improbable, if such a question was brought to judgment. (b) In

(a) A Register of English marriages, celebrated at St. Petersburg, is transmitted to the Registry of the Consistory Court of London.

(b) *Vide Supra*, p. 357. There has been no other decided case of that description, of which any trace can be discovered. In the argument on *Harford v. Morris*, the case of *Lacy v. Dickinson*, Consist. 1769, was mentioned, in which the parties, being both English subjects, who had resided at Amsterdam, went to Paris, and were married by leave of the Dutch Ambassador, in his hotel, and by his Chaplain, *in the absence of the English Ambassador*. They came afterwards to England, and the wife brought a suit of jactitation, in which Mr. Dickinson justified under the marriage, as alleged. In reply, the wife pleaded the laws of Holland, “that marriages solemnized between the subjects of their High Mightinesses, or others, in a house of an Ambassador of the States General in foreign countries, between the subjects of the States General, or others, unless the parties had been first contracted by the law of Holland, and such contract duly registered, and unless banns be duly published, in Holland, before the performance of the same, is null and void, to all intents and purposes.” It pleaded also, “that, by the laws of France, a marriage solemnized, not *in facie ecclesie*, and on publication of banns, and by the priest of the church of the parish where the parties live, and where they are domiciled, unless by special licence and faculty, is null and void.”—That cause went no further, owing to the death of the husband. The case was cited in that argument to show, that the *lex loci* had been distinctly pleaded as the ground of nullity, and the allegation admitted to that effect. It is noticed here, as showing on what principles a marriage, celebrated in an Ambassador’s chapel, was pleaded, and what was opposed to it on the other side.

the case which has now occurred,—the case of a conquering force, stationed in a conquered country or colony, for the purpose of enforcing the reluctant obedience of the natives, and composing, for the present, a distinct and immisceable body,—can it be maintained, that the success of their arms, and the service of vigilant control in which they are employed, lays them at the feet of the civil jurisdiction of the country, without any exception whatever? In a former case, (a) the Court *intimated* its opinion, (for the case never reached a decision) that the law of France would not apply to an officer of the English Army of Occupation, marrying an English lady; on the ground that, at that time, and under such circumstances, the parties were not French subjects, under the dominion of French law; and surely the condition of a garrison of a subdued country, is not more capable of impressing the domestic character, and all the obligations it carries with it, than the situation of the Army of Occupation at that time in France.

Much of the order of a society, so peculiarly placed, depends upon a discreet application of general principles to particular institutions; this can hardly be specified beforehand. But that the whole mass of law, formed for another state of things, and for a *status personarum* widely different, is to be immediately forced down upon these foreign guardians, in their own separate transactions, and without any reserve or limitation, is a proposition much too inconvenient in its consequences, to be perfectly just in its principle.

The time of this transaction is to be considered. The marriage took place at no great distance of time from the compelled surrender. This case therefore has no resemblance to the case of Ireland, the Isle of Man, the plantations, or even Minorca, where recognized civil governments had been established, and a permanent system introduced, of which all must be supposed cognizant. The Cape was conquered, but not ceded; and it remained for a treaty of peace to decide, to whom it was to belong. The ancient civil sovereignty was suspended, and no other fully established in its place. The character of the individuals is likewise to be considered. The husband goes there, not as a volunteer, or a settler, by intention of his own, or there to remain; but in the character of a British soldier, in the prosecution of a further voyage directed by British authority. He does not put himself under the law of the place; he goes there neither to purchase, sue, nor live. What the legal case of persons engaging in such concerns would be, I am not called upon to inquire; much less am I disposed to determine. The party principal is a military servant of the British government, sent upon a public errand elsewhere, and though *in itinere*, is not so upon any movement of his own. Whatever a Dutch Court might determine upon the general case of a foreigner, or even of a passing traveller, however just in such cases, has no pertinent application to the present.

Suppose the Dutch law had thought fit to fix the age of majority at a still more advanced period than thirty, at which it then stood—at forty—it might surely be a question in an English Court, whether a Dutch marriage of two British subjects, not absolutely domiciled in Holland, should be invalidated in England upon that account; or, in other words, whether a protection, intended for the rights of Dutch parents, given to them by the Dutch law, should operate to the annulling a marriage of

(a) Vid. *supra*, *Burn v. Farrar*, p. 550. /

British subjects, upon the ground of protecting rights, which do not belong, in any such extent, to parents living in England; and of which the law of England could take no notice, but for the severe purpose of this disqualification? The Dutch Jurists, *as represented in this libel*, would have no doubt whatever, that this law would clearly govern a British Court: But a British Court might think *that* a question, not unworthy of further consideration, before it adopted such a rule, for the subjects of this country. In the article of the libel which follows, it is alleged, that such a marriage would be declared by Dutch tribunals and Dutch Jurists, not only null and void in Holland, and the colonies, *but likewise in this kingdom*, and in *every other* country. I should presume, that this is a claim of universal jurisdiction, which Dutch Jurists, and Dutch tribunals, would not make for themselves. In deciding for Great Britain upon the marriages of British subjects, they are certainly the best and only authority upon the question, whether the marriage is conformable to the general Dutch law of Holland; and they can decide that question, definitively, for themselves and for other countries. But questions of wider extent may lie beyond this: whether the marriage be not good in England, although not conformable to the general Dutch law, and whether there are not principles leading to such a conclusion? Of this question, and of those principles, they are not the authorised judges; for this question, and those principles, belong either to the law of England, of which they are not authorized expositors at all, or to the *jus gentium*, upon which the Courts of this country may be supposed as competent as themselves, and, certainly, in the cases of British subjects much more appropriate judges.

It is true, indeed, that English decisions have established this rule, that a foreign marriage, valid according to the law of the place where celebrated, is good every where else; but they have not *à converso* established, that marriages of British subjects, not good according to the general law of the place where celebrated, are universally, and under all possible circumstances, to be regarded as invalid in England. It is therefore, certainly, to be advised, that the safest course is always to be married according to the law of the country, for then no question can be stirred; but if this cannot be done on account of legal or religious difficulties, the law of this country does not say, that its subjects shall not marry abroad. And even in cases where no difficulties of that insuperable magnitude exist, yet, if a contrary practice has been sanctioned by long acquiescence and acceptance of the one country, that has silently permitted such marriages, and of the other, that has silently accepted them, the Courts of this country, I presume, would not incline to shake their validity, upon these large and general theories, encountered, as they are, by numerous exceptions in the practice of nations.

The libel here states a case of marriage as nearly entitled to the privileges of strict necessity as can be. The husband was a person entitled, by the laws of his own country, to marry without consent of parents, or guardians, being of the age of twenty-one; but by the Dutch law, he could not marry without such consent till he is thirty-years of age. Now, I do not mean to say, that Huber is correct in laying down as universally true, (*De Conflict. Leg. l. i. tit. 3. s. 12.*) "*that personales qualitates, alicui in certo loco jure impressas, ubique circumferri, et personam comitari*"—that being of age in his own country, a man is of age in every other country be their law of majority what it may; yet

it is not to be laid out of the case, that the Dutch law would impose, in this respect, a very unfavourable disability upon the British subject; and it was one which, in the situation of this individual, it was extremely difficult, indeed, almost impossible for him to remove, even supposing that the Dutch law contemplated the protection of parental rights of British subjects living in England. His father lived in England, and he was pursuing his prescribed course to the East Indies for the military service. The lady was a little younger, but her father had died in the East Indies, and her mother was married again, and no guardian had been appointed. It would puzzle the person most versed in that most difficult chapter of general law, the *conflictus legum*, to say how a marriage could be effected, under such circumstances, in a manner satisfactory to the Dutch requisitions. Under such difficulties as regarded the Dutch law, the marriage naturally enough was not solemnized with any reference to that law, but under a formal licence from the British Governor, and by the ministration of an English Clergyman, the Chaplain of the English Garrison. The Crown, it is admitted, has the power of altering all the laws of a conquered country. This is an act passing under the authority of the Representative of the British Crown, and between British subjects only, in which Dutch subjects have no interest whatever, for the parties were no settlers there. It is to be presumed, that the representative was not acting without the knowledge and permission of his government, if that permission was absolutely necessary to legalize that act. It was not so in my opinion, unless the Dutch law involved such persons in its obligations; for otherwise no Dutch law was invaded by the act, though the sanction of government might be requisite for the purposes of order and notoriety.

It is, therefore, under all these circumstances that I am called upon to dissolve a marriage of twenty-five years standing, upon a ground of nullity, which is alleged to have existed in its formation, though the *vinculum* has remained untouched, by either party, during the whole time. I know that, in strict legal consideration, I am to examine this marriage in the same way as if it had taken place only yesterday. It is likewise not improbable, that the stability of many marriages may depend upon the fate of this; for, doubtless, many have taken place in a way very similar. But I know that I must determine it upon principles, and not upon consequences. Authority of former cases, there is none: The decision in *Middleton* and *Janverin*, *infra*, turned upon a ground of impeahment, that was directly the reverse of what is attempted in the present case; for the ground there was, that it was a bad marriage under the *lex loci*, to which it had resorted. So in *Scrimshire* *v. Scrimshire*, *infra*, 562, a marriage celebrated according to the French ceremonial, and by a priest of that country, but totally null and void, as clandestine, under its law: the ground here is, that it did not resort at all to the *lex loci*.

In my opinion, this marriage (for I desire to be understood as not extending this decision, beyond cases, including nearly the same circumstances) rests upon solid foundations. On the distinct British character of the parties—on their independence of the Dutch law, in their own British transactions—on the insuperable difficulties of obtaining any marriage conformable to the Dutch law—on the countenance given by British authority, and British ministration to this British transaction—

upon the whole country being under British dominion—and upon the other grounds to which I have adverted; and I, therefore, dismiss this libel, as insufficient, if proved, for the conclusion it prays.

E. S. v. E. S. 5, 5, 9.

Cases on foreign Marriage referred to in the preceding Judgment.

61, 79, 81, 4, 67.

— 2 L. & C. 60.

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Validity of marriage of British subjects contracted abroad, how far considered, by the law of England, to depend upon the law of the country where it is celebrated.—Marriage held to be null and void in this case.

THIS was a suit for restitution of conjugal rights, in which the validity of the marriage was denied, as being a foreign marriage, not celebrated according to the laws of the country in which it was contracted. The question appears to have been then brought, for the first time, to judicial determination in the Ecclesiastical Court; and the effect of that decision, in legal authority, has been the subject of much discussion in subsequent cases. It is introduced here, with the two following sentences on the same subject, as elucidating the references to former authorities, on this important subject, in the preceding case.

JUDGMENT.

Sir EDWARD SIMPSON.

THIS is a case, *primæ impressionis*, and of great importance, not only to the parties, but to the public in general. The suit is brought by Miss Jones (b), for restitution of conjugal right. She pleads a marriage in France, clandestine and forbidden by the laws of both countries, with this difference, that by the laws of France, such marriages are, in all cases, absolutely null; whereas, by the laws of England, they are only irregular, but not null, unless under special circumstances that warrant the Court to put that construction upon them. "An allegation has been given in on the part of Mr. Scrimshire, which pleads, that he was drawn in by surprise and terror to marry; that the marriage was celebrated in France; that by the laws of France, the marriage of minors under twenty-five, unless with the consent of parents, is null and void; and that marriage can only be legally celebrated in that country by the proper Priest, licensed to marry and exercise his functions within the jurisdiction where the parties live: That he was a minor, about eighteen; that Miss Jones was about fifteen: That the marriage was solemnized in a private house, by a Priest not authorized, and without the consent of parents: That, under these circumstances, the marriage was null by the laws of France. A sentence of the Parliament of Paris, declaring the marriage null, is also pleaded, not as a bar to entering into the question in this Court, Whether the marriage be good or not, but as evidence of the law of France, which may be material for the consideration of this Court in determining, whether this be a good marriage by the law of England, or not.

(a) This case is printed from a MS. note of Sir Edward Simpson, communicated by Dr. Swabey.

(b) This lady was the daughter of Theophilus Jones, Esquire, Accountant General of the Bank of England.

Before I enter into the merits of the case, I shall take notice of some preliminary objections that have been made by the counsel. Upon the return of the citation *viis et modis*, on the 23d of June 1749, Mr. *Bogg* appeared for Mr. Scrimshire. On the 26th October 1749, a libel was given in by Miss Jones, and admitted. On the same day, Mr. *Bogg* exhibited a special proxy, and contested suit negatively. And it has been insisted, that by such absolute appearance, without protest, he had submitted entirely to the jurisdiction of this Court; and that the matter should be determined by the laws of this country, without any regard to the laws of France; and that he had waived all right to any benefit, that might be derived from the sentence, which has been passed on this marriage in France.

It is further insisted, that after an absolute appearance, he had alleged the sentence in France to be a bar to any further proceedings; and that the Court having overruled that plea, the sentence of the Parliament of Paris, and the French laws, were entirely out of the case; and that the question before the Court, Whether this is a good marriage or not, ought to rest solely on the English law, with respect to clandestine marriage, without any regard to the French law on that subject. This is the inference made by counsel. But, I apprehend, these consequences, as drawn by them, will not follow from Mr. *Bogg's* absolute appearance, nor from the Court's rejecting the plea offered by him as a plea in bar.

This is a cause for the restitution of conjugal rights. Mr. *Bogg* appears to the citation, &c. and denies the marriage. This surely is not a waiver of his client's right under the French law, but rather an assertion of it. The process is for restitution of rights; and the marriage being denied, a question arises incidentally, Whether it is a marriage or not,—to determine whether the party is entitled to restitution or not, under the marriage which has been pleaded. Mr. *Bogg* pleads a sentence at Paris, in bar to entering further into the question of a marriage or not. This surely is far from waiving any right under the sentence, for he insists upon the force and effect of the sentence. The Court was of opinion *then*, and still is, that a foreign sentence alone could not, of itself, be a bar to entering into a consideration of the question, Whether this marriage between English subjects was good or not by the law of England? The Court thought, however, that such sentence was proper to be pleaded, as a circumstance, or a fact, to make evidence of the law of France, with respect to the question here, on the validity of a marriage celebrated in France. Accordingly, the sentence was pleaded, and admitted in that light; and in that light it seems to be very properly before the Court; as I think the laws of France are very material to be considered, in determining, even by our law, on the validity of a contract of marriage had and made in France. So that the Court, by rejecting the sentence when pleaded in bar, has not determined, that the sentence in France, when pleaded as a circumstance, is of no avail. Neither has Mr. *Bogg* waived all benefit of the sentence, by appearing absolutely, and pleading the sentence as a circumstance, which is evidence of the law of the place where the marriage was had, and will, in my opinion, be material in considering the points, on which the case depends.

The general questions are two:—1st, Whether there be full and legal proof that the parties did mutually, freely, and voluntarily celebrate

marriage, in such a manner as the laws of this country would deem to constitute marriage, if there was nothing else in the case, but a question on the fact of the marriage.—2dly, Whether, if the fact of the marriage should be proved, this marriage can, by the laws of this country, be effectuated, and pronounced to be good, being solemnized in France, where by law it is null and void, to all intents and purposes? For it seemed to be admitted in the argument that the law was so; but insisted, that it ought not to be a rule of determination, in this cause.

As to the fact of marriage, it is to be observed, that it is a marriage between minors,—that it is a clandestine marriage, in a private house, not by the regular priest;—that it is unfavourable, and discountenanced by the laws of both countries: and if there had not been a special act of grace, none of the persons present at the marriage could have been, in this case, legal witnesses to prove it; since it is the constant practice in Ecclesiastical Courts, to repel the testimony of persons present at clandestine marriages, till they have been absolved. Persons present at such marriages are excommunicate *ipso facto*: and in our Courts, it is not thought necessary to have a declaratory sentence of an excommunication *ipso facto*, for the Court can *ex officio* take notice of it. The practice on this point has been confirmed by constant use, under the received maxim, that *lex currit cum praxi*; and it has been so determined lately by Dr. Andrew in the case of *Collis*.

It is to be observed that this marriage was performed by a Romish Priest, according to the Roman ritual. The Romish Church acknowledges several orders; though Bishops, Priests, and Deacons, corresponding to those orders in the Church at Rome, are only allowed by us; and in the form of making and consecrating Bishops, 3 & 4 Ed. 6, c. 12. 5 & 6 Ed. 6, c. 1. s. 5. 13 & 14 Car. 2, c. 4. it is declared, that no man “is to be accounted or taken to be a lawful Bishop, Priest, or Deacon suffered to execute any function, except he be admitted thereto, according to the form following, or hath had *formerly* episcopal ordination and consecration.”

Bishop Gibson observes, that this last clause was designed to allow Romish converted Priests, who had been before ordained by a Bishop, that such Priests might be received without re-ordination; namely, that they might be received to exercise the functions of a Priest, and to do the duties of the English clergy—but not to allow them to celebrate marriage according to the Roman ritual;—for by the law of this country, it is, I apprehend, prohibited under severe penalties, for a Roman Catholic Priest to be in this country, and to exercise any part of his office as a Popish Priest in this kingdom. But as a Priest popishly ordained is allowed to be a legal Presbyter, it is generally said that a marriage by a Popish Priest is good; and it is true, where it is celebrated after the English ritual, for he is allowed to be a Priest. But upon what foundation a marriage after the Popish ritual can be deemed a legal marriage, is hard to say. Indeed the canon law received here, calls an absolute contract *ipsum matrimonium*, and will enforce solemnization according to English rites; but that contract, or *ipsum matrimonium*, does not convey a legal right to *restitution of conjugal rights*, though an English Priest had intervened, if it were otherwise than according to the English ritual. Upon what reason or foundation then should a contract of marriage entered into by the intervention of a

Popish Priest, not in the form prescribed by law, be deemed a legal marriage in this country, more than any other contract, that is considered, by the canon law, as *ipsum matrimonium*?

There may be other instances but I have not met with any but that ⁵⁶⁶ of *Arthur v. Arthur*, [Deleg: 24 June 1720.] (a) where a marriage by a Popish Priest, by the Roman ritual, has been pronounced for: but that was a marriage in Ireland, between parties, both Catholics, where the laws with respect to Papists are different; which laws, as the laws of the country in which the contract was made, the Court would respect. And in that case, there was consummation, that purified any condition in the contract. There can be no doubt, but that a marriage here by him who is in allowed orders, according to the English ritual, would be good by our laws. But I much doubt whether a marriage in England by a Romish Priest (b) after the Romish ritual, would be deemed a perfect marriage in this country: the act of Parliament having prescribed the form of marriage in this country, and changed that condition, in the contracting part, in the Roman ritual, "*if Holy Church permit*," to "*according to God's Holy Ordinances*;" and acts of Parliament having prohibited to Roman Catholic Priests the exercise of their functions. And I apprehend, unless persons in England are married according to the rites of the Church of England, they are not entitled to the privileges attending legal marriages, as *thirds*, *dower*, &c. How can a Bishop try or certify such a marriage?—Can he certify that English subjects residing in England, were lawfully married according to the laws of England, if they were not married according to the rites prescribed by act of parliament, for marriages in this country. Would a contract only by the intervention of a Romish Priest, or any Priest, be deemed a legal marriage? The Roman ritual not being the same with ours, such a ceremony is nothing more than a contract.

What I have said relates only to marriages in England by Popish Priests. For there can be no doubt but a marriage properly celebrated abroad, by a Popish Priest, after the Roman ritual, would be deemed here a good marriage; for I apprehend, that by the law of England, marriages are to be deemed good or bad, according to the laws of the place where they are made. It has been determined at common law, that if a man marries two wives, the first in France and another here, he may be tried and indicted here for that as felony; (Kelyng, 79. 1 Siderfin, 171. vid. infra, p. 572.) therefore, a marriage in France is ⁵⁷² deemed a good marriage, though not agreeable to our law; for in matrimonial causes, all laws take notice of the law of other countries.

As to the proofs relating to the asserted marriage, in the present case, it is not necessary to state them particularly. It is in proof from the witnesses, and the answers of Miss Jones,—that the parties became ac-

(a) This was a case of Appeal from the Consistorial and Metropolitan Court of Dublin, in a suit of restitution of conjugal rights on the part of the wife, in which the lawfulness of the marriage was denied on the other side, "as contrary to the laws, statutes, and canons, and the provisions of the act of parliament, [6 Anne, c. 16. See also 12 G. 1. c. 3. 19 G. 2, c. 13.] in Ireland, for the prevention of clandestine marriages of minors of certain estate and condition," &c.—The Court below had pronounced the libel of the wife not proved; but the Delegates reversed that sentence, and decreed to the effect of her prayer.

(b) But see the proof of marriage by a Popish Priest of the Imperial Envoy, in Fielding's case for bigamy, A. D. 1706. State Trials, vol. 14. p. 133, 4, et seq.

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acquainted in June 1741;—that Mr. Schrimshire went two or three times afterwards to France and visited her; that he was intimately acquainted with her, had great attachment to her, and expressed a great desire to marry her. He proposes marriage,—buys a ring,—and applies to persons to get a Priest to marry them, and declares his intention to marry. Three witnesses speak to the fact of the marriage, and all of them swear that it was free and voluntary.—He goes home and returns to be married,—which shows that it was done voluntarily. The paper, which is all of his own handwriting, and which is proved by Keating, the only surviving witness, to be free and voluntary, owns her to be his wife.—He claims her two or three days after the marriage, owns her to be his wife, but desires that it might be kept secret. He made declaration to Mr. Asgel in 1744, that if it was to do over again, he would marry her. In June 1749 there is a recognition, when he seriously owned her to be his wife, to her brother and Major Blagney. There were also many declarations on her side,—and there is not a tittle of proof, of any force or terror having been practised upon him, though it was pleaded."

The witnesses to the marriage indeed are not of the fairest character. The general character of the Priest is bad. There has been a sentence against Macgrah, condemning him to the galleys. They were all present at a clandestine marriage; which in some measure affects their credit, and would have gone to their competency, had it not been for the act of grace. They differ in some circumstances. The Priest says, "that it was after the Roman ritual." Macgrah and Keating and Jones say, "that it was after the English ritual." The form is pretty much the same, they might mistake,—but I am inclined to think that it was after the Roman ritual.—Macgrah says, "the priest set out for Bologne before Macgrah, and he did not see him again till he came into the room." The Priest says, "they set out together and arrived in the evening.—That Macgrah left him and returned in three hours to the inn, and carried him to Mrs. Dunbar's house." Macgrah says, "Bagot gave the Priest five guineas." The Priest says "Macgrah did this." Macgrah says, "Cummins asked the parties if they continued in the resolution to marry." Keating says, "that Bagot asked that question." Cummins says, "Macgrah asked it," and there are some other differences. But yet on the whole evidence taken together, there seems to full proof of affection, courtship, recognition, and a fact of marriage, by the intervention of a priest; without which undoubtedly, by our law, it could only be a contract. The Priest swears, "that he was ordained a priest, and is so, and he is reputed as such." And though his orders are not produced, yet I apprehend that this evidence is sufficient to make legal proof of it; in which I am warranted by the determination in *Arthur's* case, where a marriage by a Popish Priest was pronounced for, it having been sworn, "that he was ordained and reputed so."

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By the particular municipal laws of this country, a clandestine marriage by a Popish Priest after the English ritual, is not void, though irregular, though the Priest and the parties marrying, and present at it, may be liable to punishment for a breach of the law. But I am not satisfied, as I have before intimated, that a marriage in this country by a Popish Priest, after the Roman ritual, could be deemed a good and legal marriage;—especially where there has been no consummation. But as this marriage was had abroad, where the Roman ritual is in use,

I should have had no doubt in pronouncing for it, had there been evidence, that it was a marriage agreeable to the laws of that country.

But the great difficulty arises on the second question, from the marriage being celebrated in France, where, as it appears from Young's evidence, and the sentence of the Parliament of Paris, such marriage is null, by the laws of France. It has been much insisted on, however, that the laws of France are of no consideration in this case, the parties being both English subjects, and not domiciled in France,—which alone, as is contended, could subject them to the French laws.

The general principles which have been referred to on the subject of domicile are, that a minor son is domiciled where his father lived, until the son comes of age, or settles in another kingdom;—that domicile by birth is presumed to continue till the contrary is proved;—that *he* only is said to have changed his domicile, “*Quando quis re et facto animum manendi declarat;*” and that “*domicilium non procedit, si ille haberet animum revertendi;*” and therefore, “*Qui studiorum causa aliquo loco morantur, non domicilium ibi habere creduntur;*”—that minors who may be with a mother or guardian in another country, or may be carried there by a mother's orders, cannot be said to have an intention to change their domicile, or to have a mind to be domiciled there; and “*requiritur necessario animus ut domicilium acquiratur,—et domicilium ex animo contrahitur, et pendet ex animo.*”(a)

With respect to Miss Jones, it is contended, that she is by birth English, and that her father is now living; that she has no estate in France, and is to be considered as domiciled in the country where her father lives; that there is no proof showing any intention on her part to change her domicile; that she only went to France to visit a relation by order of her father, and for education; and had been there about eighteen months; and being a minor, could have no *animus manendi* longer than her father would permit, particularly at the house of her aunt Mrs. Dunbar, where she was only a lodger; that she must be considered, on principles of legal construction, as being there, for temporary purpose only, and with the *animus revertendi*.

With respect to Mr. Scrimshire, it is said—that he was also a minor, by birth domiciled in England, where his father died; that he had no estate in France, and is to be presumed to be domiciled in England, the contrary not being proved; that he had gone to France, on several occasions, to visit his mother, who had been living in France about two years and a half, and the last time he went, about fourteen days before this marriage, in order to proceed to Angiers for education; that the *animus revertendi* was to be presumed as to him as much as any traveller, and there was no act done by him, or declaration, which showed that he had an intention to stay there, or any thing from which such an intention can be inferred. The mother, as guardian, could not, by obliging him to live with her, effect a change of his domicile, since there could be no *animus manendi*, if it was done by order and constraint; and *ex animo domicilium contrahitur.*” On these representations it is insisted, that both parties being subjects of England, born here, and sent over to France for education, and not having any estate, on which the marriage in France could operate there, a residence such as there

(a) C. 10. 39. de Incolis, &c. l. 2 & 7.

D. 50. l. ad municipalem et de Incolis, l. 27. § 1. and many other authorities, especially Mascardus de Probationibus, conclus. 534.

appeared to be, could not give a foreign Court any jurisdiction; for that if it did, the consequence would be, that the right of English subjects must be tried by foreign law, and the estates of English subjects, lying in England, must be governed by French law, which is not to be endured. This was, in general, the purport of the argument for Miss Jones. But I apprehend the case in judgment before me does not turn or depend on the mere question of domicile. The question before me is not, whether English subjects are to be bound by the law of France; for undoubtedly no law or statute in France can bind subjects of England, who are not under its authority; nor is the consequence of pronouncing for or against the marriage, with respect to civil rights in England, to be considered in determining this case. The only question before me is, whether this be a good or bad marriage by the laws of England? and I am inclined to think that it is not good.

On this point I apprehend that it is the law of this country, to take notice of the laws of France, or any foreign country, in determining upon marriages of this kind. The question being in substance this, whether, by the law of this country, marriage contracts are not to be deemed good or bad, according to the laws of the country, in which they are formed; and whether they are not to be construed by that law? If such be the law of this country, the rights of English subjects cannot be said to be determined by the laws of France, but by those of their own country, which sanction and adopt this rule of decision. By the general law, all parties contracting gain a forum in the place, where the contract is entered into. All our books lay this down for law; it is needless at present to mention more than one. *Gayll*, lib. 2. obs. 123. says, "In contractibus locus contractus considerandus sit. Quoties enim statutum principaliter habilitat, vel inhabilitat contractum, quoad solemnitates, semper attenditur locus, in quo talis contractus celebratur, et obligat etiam non subditum." And again, lib. 2. obs. 36. "Quis forum in loco contractus sortitur, si ibi loci, ubi contraxit, reperiatur; non tamen ratione contractus, aut ratione rei, quis subditus dicitur illius loci, ubi contraxit, aut res sita est; quia aliud est forum sortiri, et aliud subditum esse." "Constat unumquemque subijci jurisdictioni judicis, in eo loco in quo contraxit."

This is according to the *text* law, and the opinion of Donellus and other commentators. There can be no doubt, then, but that both the parties in this cause, though they were English subjects, obtained a forum, by virtue of the contract, in France. By entering into the marriage contract there, they subjected themselves to have the validity of it determined by the laws of that country. So long as they resided there, each party might sue the other, and bring the case before that jurisdiction, to be determined by the law of France. And this cause seems to have been begun very properly in France against Miss Jones, while she was resident in France, and subject to that forum, in order to have it tried by its proper forum. For it appears that Mrs. Scrimshire, the mother of the minor, protested of the nullity of the marriage, by a protest, in which she gives a large account of the transaction, on the 3d March 1744; and this protest was personally notified to Miss Jones in France.

It appears further, that Mrs. Scrimshire having had notice, that some affidavits and a certificate of marriage were enrolled in an office in France, on the 13th March 1744, petitioned the Seneschal, setting forth the pro-

test and clandestine marriage, and the enrolment of the affidavits, acts, and certificate; and prayed to have the acts, &c. communicated to her, in order that she might draw such conclusions from them, as might be lawful, in the proceedings to be had in regard to her son; and that the acts might be brought to be inspected by the judge for that purpose; and declared her intention to prosecute the parties for the *raptus seductionis*, as it is termed in the laws of France. On the 14th March this was likewise notified personally to Miss Jones, and in her answer she admits that she had such notice.

A proctor appears there for Miss Jones, and alleges, that she was a minor, and not properly cited, being a foreigner. His objection was overruled; and I must suppose lawfully. The Seneschal orders the acts, &c. to be delivered to Bagot: he giving security to produce them on an appeal. From this sentence, Mrs. Scrimshire appeals to the official of Bologne, and sets forth the decree, and that she is materially interested to cause the marriage to be annulled; and prays that the acts may be brought into Court, which are necessary to prove the marriage fraudulent, for the purpose of annulling it; and protests of presenting a petition to him for that purpose. The Official inhibits the Seneschal from delivering out the papers; but the Official having only authority over the Seneschal, and to try the validity of the marriage, and not having criminal jurisdiction, it was thought proper to drop that proceeding by the advice of counsel, and to proceed before the parliament of Paris, where effectual justice could be done, by securing the papers, and punishing the parties guilty of the *raptus seductionis*, and the marriage might also be annulled. On the 18th April 1744, an appeal was accordingly interposed "from the sentence of the Seneschal at Bologne, and from the celebration of marriage."

All this appears from the proceedings; and I am to presume, that it was agreeable to the laws of France. The criminal proceedings for the *raptus seductionis* lasted from the 18th April 1744, to the 27th February 1749. On which last day, the French subjects, who had been privy to this transaction, were condemned to the galleys; and Miss Jones and others were banished for five years. And on the 26th of August 1749, the marriage was annulled.

It has been much insisted, in argument, that a citation was taken out here in June, before the sentence at Paris, and that an absolute appearance was given by Mr. Bogg *then*. But it is to be observed, that issue was not joined till the 26th October 1749, after the sentence, and that the appeal to the Parliament of Paris was in April 1744. And I do not apprehend that the mere appearance given here by Mr. Bogg, before the sentence in France, is, in point of law, a waiver of proceedings in France, or of the law of France, or an electing of another Court.

"The suit here is for restitution of conjugal rights, and a sentence in France is not of itself a bar to such suit. It is only evidence of what the French law is, by which the Court is to try the validity of the marriage, or contract. If there had been no sentence in France, the party might have showed, that it was not a good marriage by the laws of France; and he might equally have denied the marriage, whether there had been proceedings and sentence or not at Paris; as I take it to be clear, that both parties in the cause had obtained a forum in France, where the marriage contract was entered into; and by marrying there, had subjected themselves to be punished by the laws of the country for

a clandestine marriage; and had also subjected the validity of the contract to be tried by the laws of that country; as the contract itself, or the marriage, being according to the form of that country, was meant to be a marriage, or *not*, according to the laws of that country, which is still more strongly shown in this case, by inserting the words, *If Holy Church shall it admit.* "

I must observe, also, that the suit was commenced against Miss Jones, concerning the marriage in France, before she left that country; for, from the beginning, the proceedings by Mrs. Scrimshire were in order to annul the marriage; and though Miss Jones left France before the direct question on the marriage was brought before the Court in France, yet she was there during the time when Mrs. Scrimshire was taking proper steps to annul the marriage, and, on that account, I must consider the cause as begun against her before she left France, and when undoubtedly, by her residence and marriage, she was subject to the jurisdiction of that country. She ought, therefore, to have staid in France, to have defended her rights there. She might have done so, notwithstanding the war. And there have been instances of persons doing so in this country.

1 E. 2. + E.
2. 5. 5. " As both the parties, by celebrating the marriage in France, have subjected themselves to the law of that country relating to marriage; and as their mutual intention must be presumed to be, that it should be a marriage or not, according to the laws of France, I apprehend it is not in the power of one of the parties, by leaving the place, to draw the question of the marriage, or contract, "*ad aliud examen*," to be tried by different laws, than those of the place where the parties contracted. They may change the forum, but they must be tried by the laws of the country which they left. This doctrine of trying contracts, especially those of marriage, according to the laws of the country where they were made, is conformable to what is laid down in our books, and what is practised in all civilized countries, and what is agreeable to the law of nations, which is the law of every particular country, and taken notice of as such."

1 E. 2. + E.
2. 5. 5. This subject is much discussed by Sanchez, (a) to the following effect, that as to the maxim or general rule, "*Ut non teneantur peregrini legibus et consuetudinibus loci per quem transeunt*," this rule has exceptions; "1st, Quoad contractuum solemnitatem; nam quicumque forenses, et peregrini tenentur servare solemnitates in contractu requisitas legibus et consuetudinibus oppidi in quo contrahunt; ratione enim contractus quilibet forum sortitur in loco contractus, hinc est contractum absolute initum, censi celebratum, juxta consuetudines et statuta loci in quo initur. Quod ita provenit, quia contractus sequitur consuetudines et statuta loci in quo celebratur." And a case (b) is put, as to inhabitants of a place where the decree of the Council of Trent, for avoiding clandestine marriages, is not received; suppose from England they go to places "*per modum transitus, ubi obligat decretum*," and marry there according to the laws of their own domicil. Some think that such marriage is good in the case of strangers, as agreeable to their own laws, to the law of the country in which they are domiciled, though not to the law of the place where they are married. But Sanchez thinks the mar-

(a) De Matrim. lib. 3. de clandestino consensu. Disput. 18. § 10.

(b) Ibid. § 27.

riage void, because it wants the solemnities, "quæ petunt leges loci ubi contractus initur; et quoad solemnitatem adhibendam in contractibus, solæ leges loci in quo contractus celebratur inspiciuntur." These authorities fully show, that all contracts are to be considered according to the laws of the country where they are made. And the practice of civilized countries has been conformable to this doctrine, and by the common consent of nations has been so received.

The cases mentioned in the French Advocate's opinion, as well as that quoted by Dr. Pinfold, from the *journal des audiences*, lib. 1. c. 24, establish this principle. It is likewise said, that if the inhabitants of a country where clandestine marriages are forbid, go to a country where they are allowed, and marry there *in transitu*, the marriage is good; "peregrinos a domicilio absentes non teneri legibus illius, si contrariæ vigeant in loco ubi reperiantur." According to this authority also it is plain that the laws of the country where a marriage is celebrated, are to be the rule by which the validity of it is to be tried.

Voet (a) also puts the point in the same manner. "Qua solemnitate, quibus modis, contractus quisque celebrandus sit, quando solemniter initus ac perfectus intelligatur, ex lege loci in quo contractus celebratur dijudicandum est; non vero ex statutis regionis illius, ubi sitæ sunt res immobiles, circa quas, primario, aut per consequentiam, contractus versatur." Mynsinger (b) also may be cited to the same effect.

And a case is stated of a Frenchman of Paris and a minor going to Lorrain and marrying there according to law; the wife has a child, and then leaves Lorrain and goes to Paris and claims her husband. His friends institute a criminal prosecution to annul the marriage for want of consent of parents. One court thought this marriage the *raptus seductionis*; but on an appeal, the Parliament reversed that determination.

So in Holland, Voet says, (c) if an inhabitant of Holland contract a marriage in Flanders or Brabant, with a woman of the country, observing those rites which by the laws of Flanders or Brabant are required, it would appear that such marriage would be deemed good in Holland, "eo quod sufficit in contrahendo adhiberi solemnities loci illius, in quo contractus celebratur, etsi non inveniantur observata solemnities, quæ in loco domicilii contrahentium, aut rei sitæ, actui gerendo prescripta sunt." And the States of Holland have given two sentences in that manner. His own opinion however is, that the marriage was bad, not upon general principles of law, but on account of a particular and positive law in Holland, which makes all marriages whatever of Dutchmen, wherever they be, void, unless the banns are published in Holland.

As to the practice of England, there is the case quoted by Dr. Paul of Miss Fairfax, daughter to Lord Fairfax, who was publicly married to Lord Abergavenny at Paris, she being a minor, and not having her mother's consent. A suit was instituted before the Parliament of Paris to annul the marriage; and it was annulled. She came to England, and

(a) Voet in Dig. lib. 23. tit. 2. n. 85. fol. 55.

(b) Singul. Observat. cent. 3. obs. 20. n. ult. "Si quis in loco aliquo actum gerens, neglectis loci illius solemnibus, adhibuerit ea quæ vel domicilii vel rei sitæ statuta requirant, sive diversa illa sint sive pauciora—Ita gesta nullius fore momenti pronunciat, sive actum gerens extra domicilii locum servaverit solemnities domicilii, sive ea quæ requirebantur in loco rei immobilis sitæ."

This passage appears to be an abstract of the substance of the chapter, and not an extract from Mynsinger.

(c) Voet in D. lib. 23. de ritu nuptiarum, tit. 2. n. 4. fol. 20.

was maid of honour to King James's Queen, and was afterwards married to Sir Charles Carter; and Lord Abergavenny married Lord Bellasis's daughter. This shows, that in marriages abroad by English subjects, the English law takes notice of the foreign law. For if the French sentence in that case was not to be taken notice of here, they might both have been prosecuted for bigamy, and the children of the second marriage would have been bastards.

Kelyng also lays it down, that if a man marries in France and afterwards here, his first wife being living, he may be prosecuted for felony. And for this reason—because the law takes notice of foreign marriage. (a)

So where a foreign issue which is local arises, it may be tried here by a jury, according to the laws of the foreign country; and upon *nihil debet* pleaded, the laws of that country may be given in evidence. 2 Salk. 651. 6 Mod. 195. S. C.

6 months, 158.9. "Why may not this Court then take notice of foreign laws, there being nothing illegal in doing it? From the doctrine laid down in our books 2 S. C. 6.

2 S. C. 6. —the practice of nations—and the mischief and confusion that would arise to the subjects of every country, from a contrary doctrine, I may infer that it is the consent of all nations, that it is the *jus gentium*, that the solemnities of the different nations with respect to marriages should be observed, and that contracts of this kind are to be determined by the laws of the country where they are made. If that principle is not to govern such cases, what is to be the rule, where one party is domiciled, and the other not? The *jus gentium* is the law of every country, and is obligatory on the subjects of every country. Every country takes notice of it; and this Court observing that law in determining upon this case, cannot be said to determine English rights by the laws of France, but by the law of England, of which the *jus gentium* is part."

"All nations allow marriage contracts; they are '*juris gentium*,' and the subjects of all nations are equally concerned in them; and from the infinite mischief and confusion, that must necessarily arise to the subjects of all nations, with respect to legitimacy, successions, and other rights, if the respective laws of different countries were only to be observed, as to marriages contracted by the subjects of those countries abroad, all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages should be good or not, according to the laws of the country where they are made. It is of equal consequence to all, that one rule in these cases should be observed by all countries—that is, the law where the contract is made." By observing this law, no inconvenience can arise; but infinite mischief will ensue if it is not. For instance—supposing this marriage should be declared good, might not Mr. Scrimshire nevertheless go into France, and marry another woman there, the first marriage

(a) This question was moved to me at the Old Bailey, a man marrieth two wives, one in France and another in England, whether he may be indicted and tried for that felony here in England; and I took this difference, that if his first marriage was in France, and the second marriage, which maketh the felony, was in England, then I was of opinion that he might be indicted and tried here for it, and the jury might on evidence find his first marriage in France, being a mere transitory act, and having nothing of felony in it; and our juries usually find such transitory acts, though they are done in a foreign nation; but if the first marriage was in England, and the second in France, then I was of opinion that he could not be tried for it here, because the act which made the felony, was done in another kingdom, and felonies done in another kingdom are not by the common law triable here in England. Kelyng's Rep. p. 79.

being null there: he might come into England after his marriage in France, and live here, and could not be prosecuted for bigamy, according to Kelyng; for the felony, being done abroad, could not be tried here. The consequence of which would be, that he might have two wives, and might have lawful issue by both in different places. His children in France would be bastards in England, but would be legitimate in France, and might inherit there; and the children by Jones would be legitimate in England, but bastards in France, and would not inherit there. The French woman, that he married in France, would have no right to English effects, for Jones is the lawful wife here. Jones would have no right to French effects, for she is not the lawful wife in France. And if, as it may happen, after they have had children, both should go to France, and should marry again, and have children in France—what infinite confusion would attend all these consequences of such a principle, to the great detriment and inconvenience of themselves and their issue, and the subjects of both countries?

Again—If countries do not take notice of the laws of each other with respect to marriages, what would be the consequence if two English persons should marry clandestinely in England, and that should not be deemed a marriage in France? Might not either of them, or both, go into France and marry again, because by the French law such marriage is not good? And what would be the confusion in such a case? Or again—Suppose two French subjects, not domiciled here, should clandestinely marry, and there should be a sentence for the marriage; undoubtedly the wife, though French, would be entitled to all the rights of a wife by our law. But if no faith should be given to that sentence in France, and the marriage should be declared null, because the man was not domiciled; he might take a second wife in France, and that wife would be entitled to legal rights there, and the children would be bastards in one country and legitimate in the other. So that in cases of this kind, the matter of domicil makes no sort of difference in determining them; because the inconvenience to society and the public in general is the same, whether the parties contracting are domiciled or not. Neither does it make any difference, whether the cause be that of contract or marriage; for if both countries do not observe the same law, the inconveniences to society must be the same in both cases. And as it is of consequence to the subjects of both countries, and to all nations, that there should be one rule of determining in all nations on contracts of this kind, it is to be presumed, that all nations do consent to determine on these contracts, by the laws of the country, where they are made; as such a rule would prevent all the inconveniences that must necessarily arise from judging by different laws, and is attended by no manner of inconvenience, but is for the advantage of the subjects of all nations.

In the present case, there has been a sentence of the proper forum, pronouncing on the whole facts of the case, and the principles of the laws of France, as applied to them. In matters that belong to the *jus gentium*, our Courts always regard the sentences of a proper Court. As to sentences in England, by a proper Court, on a matter within its jurisdiction, without doubt they may be pleaded in bar to a suit here for the same matter.

The probate of a will, or a sentence for or against a marriage in the Ecclesiastical Court, will be received in bar, where the same is at-

ttempted to be drawn into dispute at common law. But the law of this country goes farther than the sentences of our own Courts. If an Englishman makes a will abroad, and makes a foreigner executor, and has no effects in England, and the executor proves the will lawfully abroad, that probate or sentence of the proper court establishing the will, as to effects there of a man domiciled there, would be a bar to a discovery in Chancery of effects abroad.

In commercial affairs, under the law merchant, which is the law of nations, there are instances, where sentences for or against contracts abroad, have been given, and received here on trials, as evidence, and have had their weight. And this has been allowed on a principle of the law of nations, which all countries by consent agree to, for the sake of carrying on commerce which concerns the public in general. There are instances of the same kind in the Court of Admiralty; the sentences of all Courts of Admiralty are taken notice of by one another; they are obligatory by the law of nations. By the mutual consent of all nations they take notice of one another's sentences, and give mutual faith to their proceedings. All courts of admiralty in Europe are governed by the same law,—the law of nations. And it is just, by the law of nations, for nations to be aiding and assisting to each other. And therefore, as the law of England takes notice of the law of nations in commercial and maritime affairs, because all countries are interested in those questions; and as all countries are equally interested to have matrimonial questions determined, by the laws of the country where they are had, and the mischief would be infinite to the subjects of all nations if it was not so; I am of opinion, that this is the *jus gentium* of which this and all courts are to take notice.

The principle and rule of law, as laid down in our books, is,

“Quod justæ nuptiæ solum dicuntur, quæ ritè et secundum præcepta legum contrahuntur.

“Quod non dicuntur conjuncti, qui contra leges juncti sunt.

“Quod contra jus non sunt nuptiæ.”

And Lindwood says, (fol. 155. lib. 3. tit. 9. de locato et conducto v. non teneant et v. obligatur) “verum est quod ubi lex vel statutum resistit obligationi, tunc nec initur civilis, nec naturalis obligatio. Ratio est quia obligatio naturalis dicitur de jure gentium. Sed de jure gentium debemus obedire majoribus ille ergo qui contrahit contra præcepta legum, facit contra jus gentium, unde merito non obligatur etiam naturaliter.”

So that it is certain, that by the law of all countries, a contract against law has no moral or natural obligation.

Therefore, under the circumstances of this case, as here is satisfactory evidence from the proceedings and sentence in France, and from the evidence of witnesses, that this marriage was celebrated in France, contrary to the laws of France, and is null, and not obligatory, either *civiliter* or *naturaliter*, by the laws of France; as there is no positive law of this country, which prohibits the Court from taking notice of the *jus gentium*; and as the law of the country, where the contract is made, seems to me, according to the law of nations, to be the only rule of determining in these cases; I cannot pronounce for the marriage, but must pronounce against it, and dismiss Mr. Scrimshire from the suit.

st. > 3. But under the particular circumstances of this case, in which there is no doubt that a marriage was had freely and voluntarily; and that this affair has been prejudicial to Miss Jones, who is a lady of good character; I

shall, agreeably to precedent, give a sum to her *nomine expensarum*, and fix it at 400*l*. The lady may be happy, I hope, in a man that deserves her better;—if she does not think so, it is a great satisfaction to me, that she may have the opinion of better judges.

The Court pronounced for the form of sentence porrected by Bogg, viz. "That the proctor for Sarah Jones, calling herself Scrimshire, had not fully and sufficiently founded or proved his intention, and that the said John Scrimshire ought by law to be dismissed from the instance of the said Sarah Jones as to the matters deduced and prayed by her in this cause, and from all further observation of judgment in this behalf."

2 Kent's C. 60.

HARFORD v. MORRIS.—p. 423.

Nullity of marriage, by reason of forcible or fraudulent abduction of a ward of very tender age by her guardian: 2dly, of *invalidity* of the ceremony performed, not according to the *lex loci*,—*sustained ultimately on appeal* on the facts applying to the first point: The *Libel* having been *rejected* in the Court of Arches.

THIS was a case of *nullity* of marriage, brought in the Court of Arches by letters of request from the Consistory Court of St. David's, on a marriage had abroad, as alleged, contrary to the *lex loci*, between a guardian and a ward of very tender age, under circumstances of force or fraud, as pleaded.—The admission of the libel was opposed, and it was rejected; but afterwards admitted on appeal. (a)

JUDGMENT.

SIR GEORGE HAY.

This cause comes before the Court in the name of Frances Mary Harford, by her guardians Hugh Hamersley and Peter Prevost, against Robert Morris, praying the Court to pronounce for the nullity of marriages, which she admits to have been celebrated, the one at Ypres in Austrian Flanders, the other at Ahrensburgh in Denmark, with Mr. Robert Morris. In all cases of this nature, it is highly necessary that great caution and deliberation should be observed by the Court, because of the consequences of the nullity of marriage to the parties and to the public. It is of the utmost consequence, therefore, and extremely necessary to allow of every delay, that could be allowed properly, in order to bring the whole circumstances of the case before the Court.

The party Morris does not appear here under any protest but absolutely; therefore a libel has been exhibited. In that libel it is stated, that Miss Harford is the illegitimate daughter of Lord Baltimore, that she is extremely young, was born upon the 28th November 1759, and was placed at a boarding school by Morris, who was one of her testamentary guardians. It is alleged, that he first frequently visited her there, wrote notes to her, and formed a scheme of marriage; carried her to public places here in England, and conveyed her at last to France, and from thence to the Austrian Netherlands, thence to Ham-burgh, thence to Wandsbeck and Ahrensburgh in Danish Holstein. The libel sets forth two marriages, one on the 21st May, 1772. He went

(a) This case is printed from a MS. of the whole proceedings collected from the documents in the cause, and from the notes of a short-hand writer, by Mr. Dodwell, a very intelligent practitioner of that time.

into France the 16th of May; they had not been on the continent above five days before they arrived at Ypres, and on the 21st of May 1772, they were married by a chaplain in the Dutch garrison there, in the presence of two witnesses, who are mentioned in the libel, and of other persons. They did not stay in that place more than one night, but went from thence to Lisle, from thence to Holland, and to Hamburgh and other places, and upon the 3d of January 1773, a marriage is pleaded to have been had at Ahrensburch, in virtue of a licence from the king of Denmark granted upon the 5th December 1772. That is a licence to-dispense with all form, and the marriage was celebrated at a private house, in the presence of four witnesses mentioned in the libel; One of these marriages was in the English language; One was a public marriage in a church; the other a private marriage by special licence in the presence of witnesses.

The libel sets forth, that they were had contrary to the orders of the Lord Chancellor, and without the consent of the parent or guardians, in evasion of the laws of this realm, and contrary to the laws of those countries where they were celebrated; and upon all or some of those accounts, it is prayed at the close of the libel, that the Court would pronounce both marriages to be null.

The King's Advocate, in arguing this case in June last, said, that Miss Harford, all circumstances considered, was under force and restraint, and was not *sui juris*; that she must be considered as acting from fear and under imposition; and that, on that account, the marriages were void. He likewise said, that she was seduced; that she was imposed upon by fraud, as well as by violence; and upon that account the marriages were void: and arguments of the same kind have been used by one of the counsel to-day. The Ecclesiastical Court certainly has jurisdiction in all cases whatsoever, with respect to the marriage of English subjects, wherever celebrated. If celebrated in any foreign country, and it can be shown that such marriage was contrary to the general law, to the principles that obtain every where with respect to marriage; that it was under force or restraint of either of the parties; that it was incestuous, or liable to any other impediment, under which, by the law of nations, it is not allowed to marry;—upon any such objection, it is proper to bring a suit of this nature before the Ecclesiastical Judge; and wherever such marriage was celebrated, it may, upon such objection, be set aside. The Ecclesiastical Court has complete jurisdiction to decide the marriages of English subjects by the English law; and therefore, if there was any thing to show the marriage void by the general law respecting marriages, or by any particular law of the realm, or that a marriage celebrated in evasion of the law of the realm was to be set aside, if that proposition was anywhere tenable, certainly this Court has full jurisdiction to enter into the cause of nullity, upon those accounts.

With respect to the behaviour of Morris, I have nothing to do with his moral conduct; he is answerable for that to his own conscience; and in other places for his breach of trust, and contempt of the High Court of Chancery; and such proceedings the laws of this country may punish in a proper way; but his having used any arts, or any influence whatsoever, such as entreaties or application by way of courtship, to this young lady, will not, in my apprehension, affect the validity of the marriage which he has contracted with her. What is pleaded in this case? In the twelfth article it is stated, "that after Mr. Morris had made use of the arts aforesaid, that is, by sending notes and cards, and making ap-

pointments, and carrying the young lady about to public places, and to dinners and to balls, and to Ranelagh, and amusements of that sort, by the arts aforesaid, he seduced the said Mary Harford, falsely called Morris, from the house of Mrs. La Touche; and when he had gotten her into a coach with him, he, in violation of his duty and trust, took advantage of the infancy, ignorance, and inexperience of the said Frances Mary Harford, falsely called Morris, and by divers specious pretences and entreaties, persuaded and prevailed upon her to go with him to France." When she was in France, at Bologna, as it is expressed in the thirteenth article, "she wished she was at home again;" and it is further pleaded, "that Mr. Morris threatened that he would kill himself, if she went home again, and that terrified her." No violence to her is pleaded, but he said "that he would kill himself," unless she would stay with him. The article says, "she consented;" and the question will be, Whether a consent so obtained will vitiate every thing that followed? If she acted under terror at the time when this marriage was solemnized, it might be a good ground to set it aside. But she goes from place to place with him; according to the plea, she goes to Ypres; there they sign each of them a declaration, which was not pleaded to be signed under any constraint. But it is pleaded that the declaration is false in fact, that it sets forth dates, and an age not true, and that there was no parent or guardian; but nothing is pleaded whatsoever with respect to force or violence used by Morris to make her sign that declaration. It must be taken, therefore, that she signed it voluntarily with regard to the marriage, where the marriage is said to be solemnized.

In what manner did they proceed after the marriage? On the next day they went first to Lisle, then to Hamburg, and other places, and were pursued by the guardians as soon as they had got information, which was by a letter he wrote himself, by which they were acquainted with the marriage. The libel then states the order of the Court of Chancery, upon which the guardians went abroad in pursuit of her, but without success; and that they obtained orders from the Court of France, and from the Senate of Hamburg, at the time she was there; but still they could not obtain her, as she was gone to Wandsbeck in Denmark; and she was married at Ahrensburgh, on the 3d of January 1773.

With respect to what the temper or conduct of Morris was, whether exceptionable from the means used to seduce her, there is nothing pleaded, that shows the lady was under any sort of constraint, or that any violence was used, or that she was forced to do the acts which she now complains of. It is not stated that she is not of marriageable age. If that had appeared, the libel would be admissible certainly under the general law; but there is no such plea. It is admitted, that though she was extremely young, being born in November 1759, she was of marriageable years. It is pleaded, indeed, that he carried THIS CHILD here and there, but she was above twelve and a half years of age.

The Court is to attend only to legal objections, and not to the other conduct of the parties. Is there any legal objection with respect to the marriage? She was of age to consent. It appears upon the plea that she did consent, and the contrary does not appear. She being of proper age, being free, and the marriage voluntary, as appears by the plea, I cannot think there is any ground in that part of the libel sufficient for me to receive it, by way of laying a foundation for a sentence of nullity of marriage.

The next question is, whether by the law of England this marriage is valid? It is stated throughout, that it is a marriage without the consent of the natural mother of the party, and of the testamentary guardians and the Lord Chancellor; and that the parties went into a foreign country to evade the laws of this realm. Whether upon that account, or any of the accounts already mentioned, it is void by the law of England, is the first question.

Parties may go out of England and marry by necessity or choice; in either way a foreign marriage is not void upon that account by the laws of England. But it is said, they go in violation of the order of the Chancellor, and without the consent of parents and guardians. What is the law of England, that requires the consent of parents and guardians? One of the greatest magistrates that ever appeared in this country explains it, that the view of that act was to restrain the abuse that was so scandalous in this country from clandestine marriages, and to get proof of marriages, which otherwise might become uncertain; as it is, wherever you cannot have evidence of the fact of the marriage being rightly performed, and legitimacy becomes uncertain. The principal view of that law was to affect such marriages. The law does, indeed, in one respect, put a restraint, which was not known to the common law, upon the marriage of minors without the consent of parents; but it does not make all the marriages of minors, even in England, void. Marriages by licence only are void, for want of consent of parents and guardians. If this marriage had been in England, and if instead of going abroad, the parties had been married in any great parish of this town or country by banns, would that marriage have been good or not by the laws of England? No law says that it shall be void. It is a marriage by licence only that is void by the law of England, for want of consent of the parents or guardians.

It is observed also, that the act makes particular exceptions, without which the purpose of the marriage act, though an exceeding good act, might have been questioned before this time, if there had not been so many ways to avoid the restraint put upon the marriage of minors. It is provided, that nothing in this act shall extend to marriages in Scotland, nor to any marriages solemnized beyond sea. Then marriages in Scotland and beyond sea by the law of England remain in the same state, as if the statute had not passed. Marriage in Scotland, if not contrary to the law of England, is good, and it has been so determined. [*Compton v. Bearcroft*, Arches 1767, Delegates 1769, *vide infra*, p. 585.] That determination passed, not on the ground that the marriage was valid in Scotland, and that therefore it was good—nothing was laid before the Court to shew that the marriage was valid in Scotland—but because the Act of Parliament did not put any restraint upon English subjects being married in Scotland, with respect to the consent of parents. On that ground it is that those marriages are held good; not being contrary to the law of England. The same holds as to marriages beyond sea. For English subjects going abroad, or to Scotland, to marry English subjects, have an exemption from that restraint in the act. What was the case before the marriage act? Will any body say, that before the act, a marriage solemnized by persons going over to Calais, or happening to be there, was void in this country, because such a marriage might be void by the laws of France, as perhaps it was, if solemnized

552, 3.

555.

2 *London* c.

60.

by a Protestant Priest, whom they do not acknowledge, or if in any way clandestine, or without consent; and that therefore it should be set aside by a Court in England, upon account of its being void by the law of France? No. The laws of the state to which the parties are subject must determine the marriage, unless you can show that the law of the other country is that, by which its validity is to be decided.

That brings me to the other great consideration in this case, whether the validity of these marriages, being solemnized in Ypres and Denmark, are to be tried by the laws of those countries. If they are, the laws of those countries must be laid before the Court, and proved in the best manner possible; not by the opinions of lawyers, which is the most uncertain way in the world, but by certificates, laying the ordinances of those countries before the Court. Without considering how far that law is capable of being proved in the present case, the previous question arises with respect to jurisdiction, whether the laws of that country in which the marriage is celebrated should operate, merely because it was celebrated there?

I conceive the law to be clear, that it is not the transient residence, by coming one morning and going away the next day, which constitutes a residence, to which the *lex loci* can be applied; so as to give a jurisdiction to the law, and cause it to take cognizance of a marriage celebrated there. It is certain, that domicil, or established residence, (that is, such a kind of residence as makes the party subject to the laws of that country) may have that effect; and, with respect to persons so domiciled, the laws of the country must be adhered to in contracts made there. This was the case of *Scrimshire*; all the proceedings of the Court of France were laid before the Court. I remember it, though it was a long time ago; and I was counsel for the lady. The mother of the young man was at Bologne, where they had gone *animo morandi*. It was stated in all the proceedings, that they were domiciled in France; he went there to reside for purposes of education, and did reside there; and the mother continued to reside there, till she obtained the sentence that was pleaded in the Consistory Court. I do not in the least call in question that determination in the Consistory Court. Every man has allowed the great and extensive knowledge of the Judge; but he founded his judgment upon the sentence given in that Court, which had assumed jurisdiction and had a right to assume it; he paid all respect to the judgment, and upon that he gave his opinion that the party suing should be dismissed. 562.

There was a sentence then in that case given in a competent Court, trying the question in a country where the parties were domiciled and settled. But what is this case? The parties arrive at Ypres the 21st, are married and go away on the 22d. And so strong is that circumstance felt, that it is pleaded in the 14th article of the libel, "that neither the said F. M. Harford, nor Robert Morris, ever was a subject of the French King, nor of the Empress Queen, or of the States General of the United Provinces, nor were resident in the said city of Ypres." The counsel have argued that there was no residence, that the residence in both places was fictitious, and merely for the purpose of this marriage. Can that give jurisdiction to the Courts of Ypres and Denmark, if the residence was such as to be called no residence there, and was only for the sake of this marriage,—if they were transient passengers, *voyageurs*, not going into the country with a view of becoming sub-

jects of that country. And here I must observe, that I do not mean that every domicile is to give a jurisdiction to a foreign country, so that the laws of that country are necessarily to obtain and attach upon a marriage solemnized there; for what would become of our factories abroad, in Leghorn or elsewhere, where the marriage is only by the law of England, and might be void by the law of that country; nothing will be admitted in this Court to affect such marriages so celebrated even where the parties are *domiciled*; but where the parties are not domiciled, and only going, I will not say to evade the laws of this country, as that is an improper expression, but to celebrate a marriage there, by the laws of this country, it shall not be affected by the marriage act, from which persons are expressly exempted that are beyond the sea. Can such a marriage then be called in question in this Court? I cannot say *that*, any more than I can say a Scotch marriage shall be called in question, to affect the rights of so many people married under the notion of the marriage act not reaching them, where they mutually contracted themselves. If there is nothing in this case, which shows that Mr. Morris can legally be accused of violence or any misbehaviour, such as will affect a marriage,—if there is nothing contrary to the laws of England, and if the laws of foreign countries (however clear) do not reach this case, because the parties are not subjects there, I cannot say that it is contrary to the law of England. There was no inhabitancy in the provinces of Flanders, nor of Holland, nor the United Netherlands, but on the contrary, they went as subjects to the crown of Great Britain, and must be considered as strangers there. The question then must depend chiefly upon this, whether according to the laws of Great Britain, by which they are obliged to regulate themselves, they have done the same as in Great Britain would be considered as a good and lawful marriage. The very plea states, that it was not against the laws of Great Britain. What am I to conclude from thence? If the suit on this marriage had been brought at Ypres, or in Denmark, the Courts of those countries would not have tried it there. They would have said, “we have nothing to do with you, you are not our subjects.” And so the Danish lawyer has expressed himself in giving his opinion. I am told also by the counsel, that the Danish residence was as fictitious as the other; and I take it to be so; as the plea asserts that Mr. Morris falsely stated himself to be an inhabitant of Denmark, and a freeholder of Wandsbeck, where he was said to reside.

This is then a case, which may be determined upon the libel; there is nothing affecting this marriage from the general law, from the *Jus Gentium*, and nothing contrary to the law of England. The laws of Ypres and Denmark do not reach the case; and they ought not to be pleaded upon it.

2 L. S. + L. cases where the Court of that country had a jurisdiction; or that this
 R. S. / Court would not determine upon those laws in such a case. But I deny the *lex loci* universally to be a foundation for the jurisdiction, so as to impose an obligation upon the Court to determine by those foreign laws. I think it extremely material that a question of this nature should be determined at once. I hope it will go to the Delegates, that it may quiet every question of this sort. I must declare again, though I respect and shall do every thing in my power to carry into execution, that excellent law, the marriage act, I never will interpose, as a Judge

of this Court, judging according to the laws of this country, in cases of marriage, to carry the restraints of that act further than the law intended they should be carried.

I will only add, that if foreign Courts have jurisdiction, they are open. Why does not the party go to them? Every Court may determine where it has jurisdiction. If they have none, it is absurd to say that the Ecclesiastical Court here should determine, by the laws of that country, which has no jurisdiction. One or the other has jurisdiction. Therefore take which you will,—it is impossible for the laws of another country to be the rule of this Court. I do not say, that foreign law cannot in any case be considered; but the case must be extremely clear, as clear as in that which was before Dr. Simpson, in *Scrimshire's* 562. case. There was evidence of jurisdiction assumed and exercised, and for good reasons. The whole of the proceedings in France were transmitted to the Court; and when that is done, the Court will determine upon the operation and force of such sentence so introduced; but what danger would there be to the subject to make questions of this sort determinable by foreign laws? I put it upon the clear proofs which appear upon the libel itself, without taking advantage of the words of the libel, and with reference to the substantial character of the marriage there described, I cannot find any precedents, which can possibly lay a foundation, for adducing the law of that country, where the marriage was actually celebrated in the manner which appears in this case.

Suppose a man goes to Calais, marries there, and comes away the next day, I should hold that a good marriage, according to the laws of this country. That is as much a good marriage, and as agreeable to the law, as a marriage in Scotland. I shall never think it my duty to enter into the laws of France or Denmark, to apply them in such a case as this; for all the foreign laws, as the several advocates have said, relate to subjects, and to people to be considered as subjects; and these people are not so to be considered, even upon their own showing. Upon the arguments which I have heard, therefore, and upon every view which I can form of this case, there appears to be no foundation in law for this libel,—and therefore I reject it.

An appeal was prosecuted to the High Court of Delegates, and a full commission was granted, consisting of three Spiritual Lords, the Archbishop of York (Markham), the Bishop of Rochester (Thomas), and the Bishop of Peterborough (Hinchcliffe).—Three Temporal Lords, the Earl of Hillsborough, Earl of Galloway, and Lord Sandys.—Three Judges of the Common Law Courts, Mr. Justice Willes, Sir Beaumont Hothe, Sir James Eyre.—Three Civilians, Peter Calvert, LL.D. Dean of the Arches, Sir James Marriott, Knight, LL.D. Judge of the Admiralty, William Macham, LL.D.

Counsel for Miss Harford, the King's Advocate, Dr. Wynne; the Solicitor General, Mr. Mansfield; Mr. Kenyon, Dr. Compton, and Mr. Dunning.—For Mr. Morris, Mr. Bearcroft, Mr. Arden, Dr. Harris, Dr. Bever, Dr. Scott, and Mr. Erskine.

On the 28th February 1781, the Court reversed the sentence of the Court below, and admitted the libel and retained the principal cause; and on the 21st May 1784, the cause having been fully argued on the

proofs, &c. the Delegates pronounced the said pretended marriage, howsoever had and solemnized, &c. null and invalid.

3 E. 2. In *Fust v. Bowerman*, Arches, 22d February 1790, the Court, Sir
156. W. Wynne, adverted to the grounds of that judgment, and observed:—
“The case of *Harford v. Marris*, was that of the marriage of a girl above the age of legal consent, but taken from school by one of her guardians; it was argued on the law, as void by the *lex loci*. But the Judges during the argument desired the Counsel to consider, whether the marriage might not be declared void on the ground of force and custody. That point was argued by order of the Court, and it is well known, that the decision passed ultimately on that principle.”

It had been said in argument at the bar, and was not contradicted by the Court, “that Mr. Baron Eyre was understood to have said, that he felt great difficulty on the other point.”

553, 4.

MIDDLETON v. JANVERIN, falsely calling herself MIDDLETON.
p. 437.

Marriage of English subjects celebrated abroad, not according to the *lex loci*,—held invalid.

THIS was a suit of nullity of marriage brought by Edmund Pytts Middleton against Martha Janverin, calling herself Middleton. The marriage was had between the parties at Furnes, in Flanders.

The case was argued by Sir John Nicholl and Dr. Laurence on the part of the husband: and by Dr. Arnold and Dr. Swabey for the wife.

JUDGMENT.

SIR W. WYNNE.

This is a suit of nullity of marriage, brought before me by letters of request from the chancellor of Winchester, by Edmund Pytts Middleton, against Martha Janverin, falsely calling herself Middleton. The facts pleaded in the libel, and admitted in the personal answers of Martha Middleton, are, “that Edmund Pytts Middleton, then a minor, between the age of sixteen and seventeen, (his father being dead, and his mother married to a second husband), was, in the month of December 1776, sent to the town of St. Omer, in French Flanders, for the purpose of education, and of learning the French language; that he arrived at St. Omer on the 25th of December of that year, and there became acquainted with an English woman of the age of twenty-eight years, who at that time lodged and boarded at a private house at St. Omer. On the 28th of March following, they set out with two English ladies for Austrian Flanders, in order to procure a marriage, and arrived at Furnes, which was one of the barrier towns under the dominion of the empress queen, but by virtue of the treaty of Utrecht, was at that time garrisoned by a body of troops in the service of their High Mightinesses the States General; that they arrived at an inn on Easter Sunday, and that, very soon after their arrival, one of the ladies enquired, whether there was not a minister who married English persons there, and was informed, that Mr. Vanderbrugge, minister of the Dutch garrison, had married several English people there, or to that effect.”

She further answers, “that although she was present when the said conversation passed, that she did not understand the same, because such

conversation was carried on in the French language, which she did not understand; she says, that about eleven o'clock in the morning of Easter Sunday, the 30th of March 1777, she, with the said Edmund Pytts Middleton and two English ladies, went, with the landlord of the inn as a guide, to the house of Mr. Vanderbrugge, who was, as she believes, a priest or minister in holy orders of the Calvinistic or Lutheran church; that on her arrival there, Mr. Vanderbrugge was informed by one of the English ladies, that Edmund Pytts Middleton and this Respondent were desirous of being married by him, and that he did celebrate a marriage between Edmund Pytts Middleton and this Respondent, in a room in his house, in the presence of the two English ladies, and a man who officiated as clerk on the occasion; and she believes that such marriage was solemnized in the Dutch language, and that Edmund Pytts Middleton, the two English ladies, and herself, were then all ignorant of that language; that the marriage was solemnized without any publication of banns, licence, or dispensation previously obtained, and that it was had without the knowledge of his mother or her husband, but whether he had any guardian she does not know. She says, that after the solemnization of the marriage, they quitted Furnes, and proceeded together to Nieuport, where they staid all night; and on the day following went to Bruges, and from thence to Lisle, and returned to St. Omer about a week after they had quitted it. She says, that during the journey from Furnes to St. Omer, it was proposed by this Respondent to Edmund Pytts Middleton, that, on their return to St. Omer, no notice whatever should be taken by either of them of the aforesaid marriage so had and solemnized between them, and accordingly they did not take any notice of such marriage; that they never lived or cohabited together, nor owned and acknowledged each other as man and wife at St. Omer, but that each of them lived, as before, apart, in their respective boarding-houses." She further says, "that she did not return to England, but remained at St. Omer until about the 31st of May 1777, when she left that place, and arrived in England on the 3d of June following; and she believes, that Edmund Pytts Middleton remained at St. Omer until about the month of October 1777, when he also returned to England;—that after that he frequently visited the Respondent, and at such times often earnestly requested her to keep the marriage a secret, alleging that he had reason to believe that Edmund Pytts, who was his uncle and godfather, and intended to give him a considerable fortune, would be much displeased and offended at him, in case he should hear that he was married to this Respondent, and therefore she continued to keep the marriage a secret from the said Edmund Pytts; and this Respondent believes, that about the beginning of 1780, the said Edmund Pytts Middleton went to the East Indies, and has ever since resided there, and that she has always remained in England, and considered herself and claimed to be the lawful wife of Edmund Pytts Middleton; and that since he has been in the East Indies she has written and sent several letters to him there, expostulating with him on his cruel and neglectful behaviour towards her, and entreating him to remit her some reasonable maintenance as his lawful wife, but this Respondent never received any answers to either of the said letters."

Mrs. Catharine Hansard, the mother of Mr. Edmund Pytts Middleton, says, "that about October 1777 her son returned from France to England, and continued from that time until the beginning of

1780 constantly resident with her and her husband; and during that time, the defendant, Martha Janverin, never lived or cohabited with her son as husband and wife." Mr. Hansard deposes to the same effect.

The libel, after stating the facts of the case, pleads, "that the town of Furnes was one of the barrier towns of their High Mightinesses the States General, and that there was a church or chapel there for the use of the garrison; and further states, that by the laws and ordinances of the States General in 1580, and by the resolutions dated March 13th, 1656, relative to the edict published by the Emperor Charles 5th in 1540, all of which are now in full force, it is declared, 'that marriages can in no way stand valid, without the previous knowledge of the free state of the contracting parties, and without the consent of the fathers, mothers, parents or guardians of the parties, and that, after publication of banns on three several Sundays in the place of the parties' domicile, or legal dispensation of such publication being otherwise procured;' and that by the decree of the Council of Trent made in 1563, which is received and obeyed as law in all the Austrian Low Countries, 'All marriages which are not solemnized by the *Proprius Parochus*, or Priest of the place, where the parties, or one of them, have their residence, or by some other Priest, with the licence of their own Priest, or of their Ordinary, are declared to be null and void;' and that by the laws of their High Mightinesses, as well as of the Austrian Low Countries, the said pretended marriage of Edmund Pytts Middleton and Martha Janverin was and is null and void."

In proof that this is the law of the United Provinces, to which this garrison in March 1777 was subject, they have examined four gentlemen, who are advocates, practising in the Court of Judicature at the Hague, and have been so for twenty years, and they have also examined four gentlemen practising in the Courts in Austrian Flanders, both with respect to the law and the governing powers, under the circumstances pleaded in the libel; and they conclude, "that by the laws of the United Provinces of the Low Countries, and the ordinances of the states of Holland in 1580 and 1656, there is no doubt but that the marriage is null and void on three grounds; first, on account of the incompetency of the minister who celebrated the same; secondly, on the minority of Edmund Pytts Middleton; thirdly, from the want of publication of banns."

It has, however, been said, that evidence of opinion that such is the law, is not that evidence of the law which the Court ought to require, but that it ought to have had an authentic exemplification of the laws and ordinances of those countries. Now, I think, to obtain that at this time of day would not be a very easy thing; the decrees of the Council of Trent are in print, and in every body's hands; and the particular parts of the laws, which are referred to by the advocates, are copied into their opinions, therefore, I think, there is every authentication, and every ground the Court can have, to believe that such ordinances and such laws as they mention, were actually by proper authority published, and were, at the time in question, valid and in force. To be sure, the best evidence would be a sentence of a Court of Judicature of those countries. In the case of *Scrimshire v. Scrimshire*, (supra, p. 562,) that was obtained; but in this case that would be impossible, because neither of the parties resided in the place where the marriage was performed, even for a day, but came away directly; more particularly, considering how long

it is since the transaction passed, and the revolution which has taken place there, it would have been impossible to have obtained any sentence of a court of judicature on the subject.

It, however, seems to me, that the opinion given in this case by eight gentlemen well acquainted with the laws of those countries, (and they have stated themselves, upon their oaths, to have been in official situations which they describe,) is the best evidence, that can be given, of what was the law of those countries at the time of the transaction; and I am convinced by it, that by the decrees of the council of Trent, and the laws of Holland, to which this garrison was subject, the marriage in question is absolutely null and void, as is declared by those persons.

It is however contended, that admitting the law to invalidate the marriage in those countries, yet that is not the law by which this case is to be decided in this Court. It is not the *lex loci* where the marriage ceremony is performed, which is to determine the question, but you must find out some other law, and that is declared by the counsel for Mrs. Janverin to be the law of England. Now, in respect to the *lex loci* having been adopted as a rule, I think the case of *Compton v. Bearcroft* (infra.) proves it very strongly. In that case the Court of Delegates affirmed the rejection of the libel which was given in against the marriage, on different grounds, as I have understood, from those which were taken in the Court of Arches, and because the marriage was a good marriage in Scotland, and if all facts pleaded in the libel were proved, the marriage could not be pronounced void under the marriage act; in which it is expressly declared that it shall not extend to Scotland. On those grounds it was, as I have understood, that the Delegates rejected the libel; and the case of that marriage was therefore determined by the *lex loci*. Those persons having gone to Scotland, and been married in a way not good in England but good in Scotland, and not affected by the marriage act, were considered to have contracted a valid marriage. (a).

(a) There is a difference in the account of that judgment as explained *here*, and *supra* p. 578.

The form of pronouncing judgment in the Court of Delegates, without any declaration of the grounds of the sentence, may have given rise to a different construction of the opinions of the judges on the point. The libel, which is here introduced, will show the ground on which the nullity was originally alleged, on the principle of holding English subjects, going to Scotland to evade the provisions of the Marriage Act, to the consequences of that act. That appears to have been the gist of the libel and of the arguments, so far as they have been traced in a very imperfect note. When that point was overruled, and the libel deemed inadmissible on that ground,* in which the Court of Delegates concurred with the judgment of the Court below, it might not be material to declare whether the law of England, as explained by Sir G. Hay, or the law of Scotland as here stated, was supposed to be operative. In this manner the difference of construction may have arisen. The libel pleaded,—“The marriage act, and the minority of the lady, and want of consent, and that on the 13th March 1762, a marriage was had and performed in the dwelling-house of Thomas Huddleston, a cook and confectioner at Dumfries, in North Britain, by Richard Jameson, the minister, or pretending himself to be the minister of the English chapel at Dumfries, who then lodged in the house of Thomas Huddleston, in whose lodging room the marriage was so performed between Edward Bearcroft, of Droitwich, in Worcestershire, and Maria Catharine Compton of Hartpury, in Gloucestershire, without publication of banns, and without any licence being had and obtained for the solemnization of the said marriage, from any

* Arches, 16th Feb. 1767. Libel rejected by Sir George Hay, sentence affirmed by Court of Delegates, 4th Feb. 1769.—Judges Delegate, Gould, J. Perrott, Baron, Aston, J., Drs. Ducatel and Clarke.

But the case of *Scrimshire v. Scrimshire*, which was determined in 1752, was a direct and positive sentence upon the merits of the case, which cannot be distinguished from the present, except by the different residence of the parties. Mr. Scrimshire was a bachelor, of the age of eighteen, and Sarah Jones of the age of fifteen; and being at Boulogne in France, they were joined together in holy matrimony, according to the rites and ceremonies of the Church of England. That cause began as a suit for restitution of conjugal rights. An allegation was given in reply, "that his mother had been in France for some time; that he, about thirteen or fourteen days before, went over to visit his mother; and there met with two Irish officers, by whose interference this marriage was procured. That in order to obtain a sentence against the marriage, a suit of nullity had been promoted by his mother at Boulogne; it went on for a short time there, but the Court refused to call in what is called the act of marriage. That in the year 1749, an appeal was carried to the parliament of Paris. That there two sentences were obtained: one in a criminal form, by which the minister and the officers were condemned for nine years to the galleys; and another pronounced the marriage to be null and void." In the suit here, the validity of the marriage was thus brought in question, and the Court pronounced against it, and dismissed Mr. Scrimshire. It cannot be denied that this was a sentence which proceeded entirely upon the laws of France. If the marriage had passed in this country, in the year 1752, celebrated by a priest of the church of Rome, according to the ceremonies of the church of England, it would then have been a good and valid marriage by the law of England; but the law of France being different, it was set aside. It is said, that was a single case, resting only on the opinion of one Judge, and that there was no appeal. But I also remember to have heard, that the judgment was founded on great deliberation, and that Lord Chancellor Hardwicke was consulted on it. In the case of *Butler v. Freeman*(a) Lord Hardwicke is reported to have said, "that if the marriage is not good by the law of the country where it is celebrated, it is not good at all," and the Reporter adds, that it had been lately so determined in the Court of Delegates; but, I apprehend, that was a mistake in the Reporter, mentioning the Court of Delegates for the Consistory Court.

Upon this ground I think the true principle to be, that if the marriage is had abroad, and is not good there, as being contrary to the laws of the

person having authority to grant the same, and that neither E. Bearcroft nor M. C. Compton ever was resident in any part of North Britain. But she the said M. C. Compton, in the beginning of March 1761, went from the house of John Dalby, her testamentary guardian in Berks, to pay a visit to her brother, Sir William Compton, at Hen-slip, in the county of Worcester, and he dying, she left that place and went to her mother at Hartpury, in the county of Gloucester, and from thence went, unknown to John Dalby, and without his consent, and without the knowledge of her other testamentary guardians, with E. Bearcroft, on or about the 6th March 1762, to Dumfries, to be married; and that they were married there as aforesaid merely to evade the laws of this realm, and returned into England on the same day, and proceeded to the house of E. Bearcroft, at Droitwich, and were never in North Britain, but during the time of the journey, and for the purpose of the marriage." The certificate of marriage was also pleaded in these words: "I certify, that I married, after the manner of the Church of England, Edward Bearcroft, and Maria Catharine Compton. (Signed) J. Jameson, Minister of the English Chapel at Dumfries." The prayer of the libel was, "that the marriage might be declared null and void, pursuant to the said act for clandestine marriages."

(a) Ambler, 313.; see also a similar dictum of Lord Hardwicke long before, A. D. 1744, 1 Atkyns, p. 50.

country in which it is had, it is not to be held good by the law of this country. It is said that there is a difference between this case and that of *Scrimshire v. Scrimshire*, that there was in that case a residence of one of the parties fully established; whereas these parties were only three days in the country where the marriage was performed; that in that case they were English subjects, with a considerable property in England, where they were to return for the enjoyment of all privileges and rights under the marriage so celebrated. But the residence of the young man had not been of fixed continuance, but was for a few days only, though his mother and family had been resident at Boulogne about two years before the transaction. The young lady had been there only eighteen months, and for education; therefore I do not see, that this circumstance of residence makes any substantial difference from the present case.

It is however contended that it does;—and that these parties having been but a few hours in the place, that will not give the law of the place a power over them; and therefore the *lex loci* either of Flanders or of Holland will not have any effect upon the present case. Then what will? Can it be said, that it will require some new rule to affect it? If this marriage is not to be judged by the laws of Flanders or of Holland, then by what law is it to be judged? The counsel say, “it must be judged by the law of England.” What was the law of England, in 1777? that if a marriage is had without the consent of parents or guardians, or publication of banns, (either party being a minor) it is null and void by the marriage act. I know no other law of England on the subject since 1753. But it is said, that act cannot take effect in this case, because there is an express exception that it shall not extend to Scotland, or any marriage had abroad. The reason of the exception as to marriages had abroad is perfectly clear. The act could not extend to them; for if it were held that an Englishman abroad cannot marry without the solemnities required by the act, he could not marry there at all, for it is impossible to have those solemnities observed in a foreign country. But the exception with respect to Scotland was of another kind: I am old enough to remember the passing of that act; and I recollect well that there was an intention at the time, of introducing another act of Parliament, which was to extend to Scotland; but by the Act of Union, the state of religion is not to be touched, it is to remain exactly as it was, and therefore there was a difficulty arising out of the Act of Union in applying the marriage act to that country.

The only law of England as to marriage is the marriage act: it cannot by that law be said that a marriage is good which is not had according to it. It is true that a marriage had abroad is not within that act. But it does not follow from thence that it is good by the law of England. For, as I have before said, I know of no other law of England but *that*. And the question will be, whether it be good by the law of the country in which it was celebrated. I am clearly of opinion that this marriage, which was had at Furnes, in the manner that I have stated, does not amount to a valid and legal marriage. It is not so by the law of the country in which it was celebrated; it is not so by the law of this country, and therefore I pronounce it to be null and void.

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B.

BAR.

1. The wife having failed in a charge of adultery, and a recriminatory plea on the husband's part being proved; cruelty, and the introduction of his wife to a female of loose character (the wife's guilt not being connected with such introduction), form no bar to his prayer for divorce. *Harris v. Harris.* 160
2. Cruelty cannot be pleaded by the wife in bar of a charge of adultery. *ibid.*
3. Recrimination, in a suit of divorce by reason of adultery, alleged in bar, &c.—Party dismissed. *Forster v. Forster.* 358
4. Protest, Proceedings in a Court of Brussels, pleaded in bar to a suit *here* for a divorce by reason of adultery, not sustained. *Sinclair v. Sinclair.* 412

BRAWLING.

1. Proceedings under the stat. 5, 6 Edw. 6. ch. 4. s. 1. [for *quarrelling, chiding, or brawling*.] must be supported by two witnesses on the specific charge.—Dismissed. *Hutchings v. Denziloe.* 365
2. Offence [brawling] under the stat. 5 and 6 E. 6. c. 4. as charged against the clergyman, for words spoken during Divine Service.—Defence—that they were justifiable as reproof,—not sustained. *Cox v. Goodday.* 523

C.

CAPACITY.

1. Where there is a great change of disposition and a total departure from former testamentary intentions long adhered to, it is material to examine the probability of the change, especially, if at the time of making the latter disposition the capacity is doubtful, still more, if the person in whose favour the change is made, possessing great influence and authority, originates and conducts the whole transaction. *Marsh v. Tyrrell.* 33
2. A person who can understand and answer, rationally, questions, may still not be capable of making a will for all purposes. The rule of law is, that the competency of the mind must be judged of by the nature of the act to be done, and from a consideration of all the circumstances of the case. *ibid.* 34

CHAPEL.

A chapel being shortly before 1735 built by private subscription, and subscribers agreeing, out of the pew rents, to pay the rector of the parish a yearly stipend for performing divine service, a license was obtained from the bishop to the Rector and his successors, who, from time to time, performed therein parochial duties, but there was no proof of consecration, nor any of composition, between the patron, incumbent, and ordinary; such chapel is merely proprietary, and the minister, nominated by the rector of the parish and licensed by the bishop, cannot perform parochial duties therein, nor distribute the alms collected at the Lord's supper.

Proprietary chapels are anomalies unknown to the constitution, and to the ecclesiastical establishments of the church of England, and can possess no parochial rights. *Moysey, D. D. v. Hillcoat.* 21

CHURCH RATE.

1. In a suit for subtraction of church-rate,

the Court will not, at the prayer of the defendants, issue a monition for the production of parish books, which are not shown to apply immediately to the question at issue: and on the merits, the rate being pronounced for, the defendants condemned in costs.

2. In questions of subtraction of church-rate, the Court having jurisdiction on the subject-matter is bound, unless stopped by a prohibition, to proceed to the trial of a select vestry by which the rate was made. *Goodall and Gray v. Whitmore and Fenn.* 160

CHURCHWARDEN.

1. Election of churchwarden. Alien disqualified; effect of the poll considered as to the other parties, on the disqualification of the person elected. Re-election. *Anthony v. Seger.* 309
2. Proceedings against a churchwarden, for interfering to obstruct and prohibit the form of singing, &c. which had been authorized by the minister, sustained. Question of practice.—Whether on a citation to appear on a day fixed, and receive articles, &c. the person is entitled to demand that the articles shall be delivered on the first Court-day, or that otherwise he should be dismissed.—Not so held. *Hutchins v. Denziloe.* 365
3. Parochial offices. Non-resident partner, in a house of trade, not exempted from serving the office of churchwarden. *Stephenson v. Langston.* 437

CONDONATION.

1. In answer to a suit for restitution of conjugal rights brought by the husband, legal cruelty being established, but a reconciliation and matrimonial intercourse having afterwards taken place, the Court enjoined the wife to return to cohabitation, holding, that there was no proof of subsequent misconduct by the husband, sufficiently removing the bar of condonation, and reviving the previous cruelty, to entitle the wife to a sentence of separation.
2. Reconciliation will supersede the ground of complaint in the Ecclesiastical Court, as it annihilates articles of separation at common law.
3. The force of condonation as a bar varies according to circumstances. The condonation by a husband of a wife's adultery, still more repeated reconciliations after repeated adulteries, create a bar of far greater effect, than does the condonation by a wife of repeated acts of cruelty.
4. On the execution of articles of separation, not followed by matrimonial intercourse, the wife's reluctant assent

to the husband having a bed-room in her house, at the earnest intreaty of him and of mutual friends, and on his declaring, "that he should be merely under the roof by sufferance," is no continuation of a former condonation. *Westmeath v. Westmeath.* 238

CONJUGAL RIGHTS, RESTITUTION OF.

See DIVORCE.

COSTS.

1. Costs, though in the discretion of the Court, are in its legal discretion guided by former precedents, and are almost universally decreed in suits for church-rates, where the rate is pronounced to be subtracted. *Goodall and Gray v. Whitmore and Fenn.* 160
2. Where capacity and volition are established, a party suing *in forma pauperis* who after a long acquiescence calls in probate of a will, on a suggestion of incapacity, fraud, and circumvention, may be condemned in costs; and the taxation be suspended. *Wagner v. Mears.* 197
3. The costs of exceptive allegations tendered on both sides (the admission whereof was suspended till the final hearing, and then not prayed to be received), not allowed to be taxed against a party condemned in costs. *Bird v. Bird.* 211
4. Costs of the wife, having a sufficient independent income, not allowed to be taxed against the husband during the proceedings. *Wilson v. Wilson.* 527

CRIMINAL SUIT.

1. In a vestry-meeting for civil purposes, as a full latitude of discussion must be allowed, mere coarse expressions do not constitute "brawling," but on proof of an act of "smiting," the Court is bound, whatever may be the origin of the dispute, to proceed to award punishment, under the 5 & 6 Edw. 6. c. 4. and 53 Geo. 3. c. 127.
A party pronounced excommunicate, sentenced to seven days' imprisonment, and condemned in costs. *Hoile v. Scales.* 216
2. Pleading a criminal suit, for brawling in the church:—Office of the Judge wrongly described, in a copy of the articles, fatal. *Williams v. Bott.* 309

CRUELTY. "*9. de reg.*" 438, 51

- 1.—1. In answer to a suit for restitution of conjugal rights, the wife, (having pleaded cruelty and adultery) proved several acts of personal ill-treatment, violent behaviour and language, from 1813 to

1817; a separation was then agreed upon, but, on a reconciliation, matrimonial cohabitation and intercourse were renewed. The court on appeal—holding that adultery was not proved; that cruelty up to 1817, was proved, and that, though afterwards there was no personal violence, his conduct, exciting reasonable apprehension of it, revived the former cruelty—decreed a separation, and condemned the husband in the costs in both Courts, except those incurred by certain charges of adultery.

2. To entitle a wife to a separation by reason of cruelty, there must be ill-treatment and personal injury, or the reasonable apprehension of personal injury.

3. Aggravations of cruelty may arise from the station of the parties; from the condition of the sufferer; from natural or even acquired feelings.

4. If legal cruelty be established, a subsequent reconciliation and matrimonial intercourse form a legal bar to a separation for such preceding cruelty. And the question then is, whether any subsequent acts take place furnishing fresh grounds of legal complaint, or at least reviving former wrongs, and, in connection with those former wrongs, creating reasonable apprehension of a renewal of ill treatment.

5. Cruelty generally consists of successive acts of ill-treatment, if not of personal injury, so that something of a condonation of the earlier ill-treatment necessarily takes place.

6. If a wife, after legal cruelty, consents to a reconciliation and to matrimonial cohabitation, former injuries would revive by subsequent misconduct of a slighter nature than would constitute original cruelty, though the reconciliation would be a bar if no further ill-treatment took place. *Westmeath v. Westmeath.* 238

2. Divorce by reason of cruelty.—What circumstances constitute cruelty in construction of law. Dismissed. *Evans v. Evans.* 310

D.

DECLARATIONS.

Declarations of testamentary intentions, if unaccompanied by any immediate acts, are always looked upon with great caution, and their weight depends upon all the circumstances accompanying and connected with them. *Myers v. Robinson.* 72

DEED.

Probate granted to a deed, testamentary
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in its whole purport and effect, and not to operate till after death. *Knight, in re.* 211

DEED OF SEPARATION.

A deed of separation, upon mutual agreement, on account of unhappy differences, though containing a covenant not to bring a suit for restitution of conjugal rights, is no bar to such a suit.—*Westmeath v. Westmeath.* 238

DEFAMATION.

1. In a defamation suit, the defendant having been enjoined penance, and condemned in costs; and to an appeal from his dismissal without such penance being duly performed, having given an affirmative issue, the Court directed penance to be performed, as originally decreed, and condemned the defendant in the further costs. *Courtial v. Homfray.* 11
2. Defamation, the testimony of two witnesses required, but not necessary that they should speak to the same fact.—*Crompton v. Butler.* 455
3. Defamation. Words amounting thereto in legal construction; direct terms not necessary. *Smith v. Watkins.* 455

DEPRIVATION.

1. The Court is bound to admit articles by a church warden against an incumbent for frequent irregularities in the performance of divine service, and of parochial duties, and also for his violating the churchyard: nor (the suit being commenced in April 1828, and the alleged offences being laid from September 1824, till January 1827) is the lapse of time any bar. *Bennett v. Bonaker.* 21
2. Upon the proof against a clergyman, of repeated and habitual acts of incontinency, coupled with neglect of duty and other conduct affording just scandal and offence to his parishioners, the Court is bound to proceed to deprivation. *Burgoyne v. Free, D. D.* 192
3. A clergyman may be deprived for fornication without previous monition or suspension. Sentence of deprivation affirmed with costs. *Free, D. D. v. Burgoyne.* 226
4. Proceedings under the stat. 13th Eliz. c. 12. against a Clergyman, for preaching doctrines contrary to the articles of religion.—Deprivation. *Bishop, H. M. Procurator General, v. Stone.* 445

DILAPIDATION.

Dilapidation.—Demand against a sequestrator.
75

trator. Objection thereto, "that he was not liable for more than the surplus, on rendering his account,"—not sustained. *Hubbard v. Beckford.* 419

DIVINE SERVICE.

By the general law the church service ought to be regularly performed every Sunday morning and evening. Any relaxation is to be supposed to have been permitted by the diocesan, owing to the circumstances of the parish; and the terms prescribed must be strictly observed. *Bennet v. Bonaker.* 21

DIVORCE.

See CRUELTY. ADULTERY.

1. Divorce—Protest, as to the validity of the appointment of the guardian of the wife, *ad litem*—and as to the effect of a citation, describing the party in a wrong parish, but cured by appearance, overruled. *Barham v. Barham.* 309
2. Restitution of conjugal rights. Counter-allegation,—of cruelty in menacing and insulting treatment, and prayer for divorce thereon, not sustained on the facts. Restitution decreed. *Oliver v. Oliver.* 429
3. Divorce, by reason of cruelty of the husband, sustained on the facts. *Holden v. Holden.* 452
4. Divorce by reason of cruelty, on words of menace accompanied by violence, &c. *Harris v. Harris.* 523
5. Suit of divorce brought by the wife, for cruelty—Justification, from the conduct of the wife, sustained. *Waring v. Waring.* 523
6. Committee of a lunatic competent to institute a suit of divorce, by reason of the adultery of the wife, on behalf of the lunatic. *Parnell v. Parnell.* 524
7. Divorce by reason of adultery; Proof,—confession of the particeps criminis, as connected with the act of the wife, admitted. *Burgess v. Burgess.* 527
8. Divorce, by reason of the adultery of the Husband.—Connivance on the part of the Wife, from forbearance; not inferred.—Objection to libel overruled. *Lady Kirkwall v. Lord Kirkwall.* 541
9. Divorce, by reason of adultery, barred by the *compensatio criminis*, committed even after the adultery of the defendant.—Recrimination sustained. *Proctor v. Proctor.* 543
10. Divorce by reason of adultery: confession in *articulo mortis*, as then apprehended, afterwards retracted: effect, as pleaded. Objection overruled.—Cause ultimately settled by agreement. *Mortimer v. Mortimer.* 543

E.

EVIDENCE.

1. The performance of baptisms, marriages, and burials, in a chapel existing from time immemorial, might possibly be presumptive evidence of consecration, and of a composition: *aliter* as to a chapel, the origin of which is ascertained. *Moysey v. Hillcoat.* 21
2. Principles of evidence in cases of divorce by reason of adultery, &c. *Loveden v. Loveden.* 461

EXCEPTIVE ALLEGATION.

1. Exceptive allegations, after publication, are *stricti juris*; and their object being the credit of the witness,—not the proof of the matters in issue in the principal cause;—1st, Facts which might have been pleaded in contradiction to the pleas before publication, cannot be pleaded in contradiction to a witness: 2dly, There must be a contradiction to the depositions clear and capable of proof, and showing that the witness has deposed falsely and corruptly: 3rdly, The matter must arise out of the evidence (not out of the general character) of the witness.—Allegation rejected. *Burgoyne v. Free.* 192
2. The Court will not admit an exceptive plea that an indictment of witnesses, for perjury in their depositions in the cause pending, has been preferred and a true bill found, nor delay the hearing till the indictment is tried. *Maclean v. Maclean.* 219

F.

FACULTY.

1. A faculty (for annexing a pew to a messuage) obtained by surprise and undue contrivance, may be revoked. *Butt v. Jones.* 179
2. Faculty for erecting a gallery, for the accommodation of the increased population of the parish, granted.—Objections on the part of certain parishioners overruled. *Groves v. The Rector, &c. of Hornsey.* 366
3. Faculty for accepting and erecting an Organ, offered to Parish Church of St. John's, Margate,—granted, without clause against future expenses being charged to the Parish. Objection, on the part of certain Parishioners, overruled. *The Churchwardens of St. John's, Margate, v. The Parishioners, Vicar, and Inhabitants of the Same.* 366
4. Proceedings promoted by the Rector of

the Parish, against a person for erecting a monument in the Church without a Faculty.—Sustained. *Maidman v. Malpas*. 366

5. Right of Parishioner to a seat in the Parish Church.—Insufficiency of the return of Churchwardens, to an application for that purpose: Rule of construction as to Custom and the extent of a Faculty. *Walter v. Gunner*. 422

FELONIOUS ACT.

Felonious acts, on what principles admitted, and under what limitation allowed to be pleaded in the Ecclesiastical Courts. *Nash v. Nash*. 357

H.

HAND-WRITING.

A codicil produced under mysterious circumstances eighteen months after the deceased's death—there being no evidence of finding nor of any thing directly connecting it with the deceased—cannot be established on evidence of hand-writing alone, particularly when such evidence is conflicting, and when other circumstances raise a suspicion of the genuineness of the instrument. *Crisp and Ryder v. Walpole*. 201

I.

INCEST.

Incest.—Office of the Judge against parties living in incestuous cohabitation. Separation. Penance. *Burgess v. Burgess*. 437

INCUMBENT.

Prima facie all parochial duties are committed to, and imposed upon, the parish incumbent, and all fees and emoluments arising therefrom belong to him; and such rights can only be granted to a chapel, or its officiating minister, by composition with the patron, incumbent and ordinary: *quære*, whether not also with a compensation to future incumbents. *Moysey v. Hillcoat*. 21

INFLUENCE.

A feme covert—having, under certain powers, made a will and codicil in February, 1818, (eight months after marriage) by which, after making provision for her husband and leaving sundry legacies, she bequeathed the bulk of her fortune to, and appointed executors,

strangers in blood; such disposition (except the provision for the husband) being similar to a will in 1816;—made a will on the 9th of March, 1827, and a codicil thereto on the 21st of April (she dying on the 8th of May) 1827, which papers, except legacies to three servants and rings to three friends, left all her property to her husband, and appointed executors, him and a total stranger: the Court, holding that the latter papers were obtained by the husband's undue influence, when her faculties were much impaired, pronounced for the will and codicil of 1818, and condemned the husband (who though he denied the validity of the powers and nominally prayed an intestacy, was the real party setting up the latter papers) in the costs of the executors of the will of 1818. *Marsh v. Tyrrell and Harding*. 33

IRON COFFIN.

Right of burial, in imperishable materials; how far restrained by considerations of public convenience: *Patent Iron Coffins*, the subject of the present question, admitted at an increased rate of payment to the parish. *Gilbert v. Buzzard and Boyer*. 550

J.

JEWISH MARRIAGE.

See MARRIAGE.

JURISDICTION.

1. Proceedings against a person for erecting tombs in a church-yard without due authority, sustained. *Bardin and Edwards v. Calcott*. 309
2. Jurisdiction of the Bishop of London, over *Ely* chapel, established:—Exemption, of ancient privileges allowed to the Bishops of *Ely*, in virtue of their episcopal residence, in *Ely* palace, overruled, as not continuing after the property had been transferred. *Barton v. Wells*. 309

L.

LICENCE.

1. The incumbent of the parish has a right without licence to perform divine service in any consecrated building within the parish. *Semble*, therefore, a licence to the rector from the ordinary, to perform divine service in a chapel, tends to show that the chapel was not consecrated. *Moysey v. Hillcoat*. 21
2. Licence to preach in Quebec chapel in

Mary-le-bone, not allowed to be impeached, by proceedings on the part of the impropiator, in a civil suit—he not showing an interest that would entitle him to maintain such a suit. *The Duke of Portland v. Bingham.* 365

LUNACY.

Where the deceased was admitted to have been insane before the execution of two asserted wills, and where there was evidence of delusion and other *indicia* of derangement existing shortly before, as well as subsequent to the acts, proof of calmness, and of his doing formal matters of business, under the sanction of his family, are not sufficient to rebut the presumption against the papers. *Groom and Evans v. Thomas.* 181

M.

MARRIAGE.

1. Marriage in the parish church, or some public chapel, required by 26 G. 3. c. 33. s. 1. *Exception*, as to the chapel of a Foreign Ambassador, between foreigners, not being of the Ambassador's country, not admitted. *Pertreix v. Tondeur, falsely calling herself Pertreix.* 357
2. In nullity of marriage by reason of minority, at the suit of the father, a prayer, on the part of the wife, "that the minor, now of age, might be called to declare, whether he would carry on the suit, or that otherwise she might be dismissed."—Not sustained. *Bowzer v. Ricketts.* 367
3. Validity of Jewish marriage, tried by evidence of the laws of the Jews, as in cases of Foreign Marriage.—The asserted marriage held invalid. *Lindo v. Belisario.* 367
4. In nullity, by reason of minority, and want of consent of the parent,—what consent required. Consent, once given, how to be retracted. *Hodgkinson, falsely called Wilkie v. Wilkie.* 401
5. Jewish marriage invalid under that law, by reason of the incompetency of witnesses, required as an essential part of the ceremony. *Goldsmid, by her Guardian, v. Bromer.* 422
6. Consent of parents, under 26 Geo. 2. c. 33. s. 11. not applicable to the marriage of illegitimate minors. *Horner v. Liddiard.* 428
7. Suit of nullity of marriage, by reason of publication of banns in a false name, not sustained by the facts. *Wakefield v. Mackay.* 438
8. Nullity of marriage, by reason of insanity of the husband, brought by himself after his recovery, sustained. Former proceedings on the part of the father not admitted; the son being of age at the time of marriage. *Turner v. Meyers.* 440
9. Suit of nullity of marriage, by licence, by reason of the false description of names, not sustained. *Cope v. Burt.* 445
10. Marriage,—by contract without religious celebration, according to the law of Scotland, held to be valid: Distinction, as to the state of one of the parties, being an English officer on service in that country, not sustained. *Dalrymple v. Dalrymple.* 485
11. Nullity of marriage, by reason of false and imperfect publication of banns, omission of one Christian name, which had been the name most commonly used—fatal. *Pouget v. Tomkins.* 523
12. Nullity of marriage by licence, by reason of minority and want of consent [of the parent,] sustained. *Jarvis v. Jarvis.* 524
13. Nullity of marriage, by reason of fraud and alteration of licence, not sustained. *Wheatley v. Wheatley.* 524
14. Suit of nullity of marriage, by reason of a former marriage, sustained. Strict proof required of the identity of the parties. *Searle v. Price.* 524
15. Nullity, by reason of the want of due consent: the mother, who had given consent, being alleged to be the natural mother. Evidence on that point, how considered,—not sufficient; party dismissed. *Fielder v. Smith.* 527
16. Nullity of marriage, by banns, by reason of minority and want of consent of the father. On the suit of the father, sustained. *Meddowcroft v. Gregory.* 537
17. Nullity of marriage, by a publication of banns in a false name, sustained.—Nature of proof required as to identity. *Wyatt, falsely called Henry v. Henry.* 537
18. Nullity of marriage, by reason of publication of banns in false names, not supported in fact. *Sullivan v. Sullivan.* 534
19. Validity of a marriage, celebrated at Palermo according to the law of Sicily, established. *Lady Herbert v. Lord Herbert.* 534
20. Jactitation of marriage.—Factum of marriage pleaded, but not sustained in proof.—Effect of imposition of such celebration, if actually practised, *quære*. The Court ultimately declined to pronounce for jactitation: it appearing to have been done, originally, with the permission of the party. *Lord Hawke v. Corri.* 543
21. Citation, in a suit of nullity of marriage, by reason of incurable impotence; not sustained: The complainant having confessed the validity of the marriage in

- former proceedings for divorce, by reason of adultery, against him. *Guest v. Shipley*. 548
22. Nullity of marriage by reason of incurable impotence alleged against the wife, *not* sustained. The charge allowed to be repelled under the circumstances of age, &c. and by a denial, in the form of protestation, by affidavits. *Briggs v. Morgan*. 550
23. Nullity of marriage alleged on the *lex loci* of France, on a marriage between English subjects, celebrated by the chaplain of the British forces, then in the occupation of the country. Libel admitted: Principal question reserved. *Burn v. Farrar*. 550
24. Nullity of marriage, alleged on the *lex loci* of Holland, as not conformable thereto, with reference to a marriage celebrated between British subjects at the Cape, by the chaplain of the British forces, then occupying that settlement under capitulation. Libel not admitted. *Ruding v. Smith*. 551
25. Validity of marriage of British subjects contracted abroad, how far considered, by the law of England, to depend upon the law of the country where it is celebrated.—Marriage held to be null and void in this case. *Scrimshire v. Scrimshire*. 562
26. Nullity of marriage, by reason of forcible or fraudulent abduction of a ward of very tender age by her guardian: 2dly, of *invalidity* of the ceremony performed, not according to the *lex loci*,—*sustained ultimately on appeal* on the facts applying to the first point: The Libel having been rejected in the Court of Arches. *Harford v. Morris*. 575
27. Marriage of English subjects celebrated abroad, not according to the *lex loci*,—held *invalid*. *Middleton v. Jawerin*. 582

N.

NOVITER PERVENTA.

In a suit for separation by reason of the wife's adultery, (publication having passed,) the Court—on an affidavit that material facts are newly discovered, may, in its discretion, allow the cause to be opened for the purpose of pleading further adultery.

Material facts, newly come to the knowledge of the party, may be pleaded after publication.

Before a party can plead after publication, he must show (generally by affidavit) that the facts came to his knowledge since his former plea: the Court then ought to admit a plea of such facts. *Middleton v. Middleton*. 299

O.

OFFERTORY MONEY.

Alms, collected in chapels as well as in parish churches during the reading of the offertory, are by the direction of the rubric at the disposal of the incumbent of the parish and the churchwardens thereof, and not of the minister or proprietors of the chapel. *Moysey v. Hillcoat*. 21

P.

PAROL EVIDENCE.

The Court of Probate does not admit parol evidence to show an error in a testamentary paper, unless there be, 1st, some ambiguity on the face of the instrument: 2ndly, the means of obtaining clear and indisputable proof of the deceased's intention. *Harrison v. Stone*. 204

PAUPER.

See *Wagner v. Mears*, 524

PEER.

The Court will pronounce an Irish Peer in contempt for non-payment of costs, and direct such contempt to be signified, leaving the Lord Chancellor to decide whether the writ *de contumace capiendo* should issue. *Westmeath v. Westmeath*. 226

PLEADING.

A party cannot plead the contents of an instrument, unless it is destroyed or in the possession of the adverse party. *Morse v. Morse*. 220

POWER OF THE COURT.

Appointment of the father of a minor, as *curator ad litem*, on election of the minor, but without consent of the father, in order to substantiate proceedings against the son in a suit of cruelty and adultery, *not sustained*. *Beauraine v. Beauraine*. 455

PRACTICE.

1. Though an affirmative issue to a libel of appeal from a definitive sentence be given, the process must be transmitted, where the Court of appeal has to take any step requiring a knowledge of the proceedings, or of the sentence of the Court below. *Courtail v. Homfray*. 11
2. Original papers brought into the registry by A., in a suit between A. and B. as to the will of C., cannot be delivered out to D., on an affidavit of D.'s attor-

- ney, that D., as heir at law of C. was in possession of certain premises, and that these papers were muniments of title thereto. *Hulme, re.* 33
3. After publication, the evidence of an attesting witness may be excepted to by the party who produces him. *Mynn v. Robinson.* 72
4. A citation, issuing as "in a suit of nullity of marriage by reason of a former marriage," will not found a sentence of separation "by reason of an undue publication of banns," the woman being therein described as spinster, the first husband having died subsequent to the publication of the banns but prior to the marriage. *Wright v. Elthood, calling herself Wright.* 216
5. The Court will not depart from its regular practice, by directing a list of witnesses to be delivered, some time anterior to their production, to the other party residing voluntarily in France. *Morse v. Morse.* 220
6. The appellants (interveners in the court below) being described in the commission of Delegates as "the Parochial Schoolmasters of Scotland," *quære* whether, notwithstanding the absolute appearance of respondents, the inhibition ought not to be relaxed, on the ground that the appellants, not being a body corporate, had no *persona standi* in their collective capacity. *The Parochial Schoolmasters of Scotland v. Fraser.* 222
7. The renouncing all further allegations, unless exceptive, is the virtual conclusion of the principal cause as to the rights of parties: leave for further pleading is in the discretion of the Court. *Middleton v. Middleton.* 299
8. Misnomer—how considered.—Averment of the party, as to his true name, required, and binding on him. *Pritchard v. Dalby.* 365

PRESUMPTION.

Every person is presumed sane till shown to have become insane; the presumption then changes, and a party setting up an instrument executed after the existence of insanity, has the burthen of proof cast on him, and must show the mind perfectly restored, and delusion removed. *Groom v. Thomas.* 131

PROBATE.

1. Ink alterations in a will being carefully made and not improbably final, the Court will not, on the non-appearance, after personal service, of executors appointed—and of minor legatees materially benefited thereby,—grant probate, in common form, of the papers as originally executed. *Ravencroft v. Hunter.* 24
2. Alterations in ink, (in the margin and

- body of a duplicate will) carefully made and conformable to long entertained and lately expressed intentions, held to contain the testator's final intentions and entitled to probate. *Ibid.* 25
3. Of wills of the same date, that, in the testatrix's possession and to which she last added codicils, is entitled to probate, together with the codicils found therewith, and unrevoked codicils found with the other will. *Grosley, re.* 32
4. Probate cannot be granted of a paper having nothing to give it a testamentary character; and not intended to operate upon the death of the writer; but to effect a gift *inter vivos*. *Glynn v. Oglander.* 428

PROOF.

1. When no indecent familiarity, proximate act, or personal freedom (except two kisses), and no circumstances inferring adultery, are proved; letters from the alleged paramour, found in the wife's possession, but not necessarily implying the commission of adultery, will not support a sentence of separation by reason of her adultery: but if the evidence raises a suspicion that an adulterous intercourse is carrying on between the parties accused, the Court may, upon affidavits, rescind the conclusion, and allow the husband to give in an allegation. *Hamerton v. Hamerton.* 13
2. Where the execution of a codicil was clandestinely, and without previous instructions, obtained—from a testator of eighty—only one month before death, by the son—the person solely benefitted—and his associates, the disposition being contrary to the repeated former acts of the deceased, the clearest proof of capacity and free agency is necessary. Codicil pronounced against, and the son condemned in costs. *Mackenzie v. Handasyde.* 92
3. A will may be pronounced for, though both the attesting witnesses depose to the deceased's incapacity. *Le Bredon v. Fletcher.* 213
4. In a suit for separation by reason of the wife's adultery, after the arguments of counsel are closed and after the Court has delivered its opinion, that though culpable and suspicious conduct had been, adultery had not been, proved, it is a fit exercise of discretion to rescind the conclusion, for the purpose of admitting an allegation pleading further matter to establish the wife's guilt. *Hamerton v. Hamerton.* 224

R.

REPUBLICATION.

A formal is republication is not necessary

in personalty, as to which no publication is necessary. *Miller and Ross v. Brown*. 91

RESCINDING CONCLUSION.

1. In a suit for separation by reason of the wife's adultery, the conclusion of the cause may be rescinded generally; if the Court is of opinion, after the argument, that adultery is not sufficiently proved. *Donellan v. Donellan*. 304
2. In a testamentary cause, the Court—after hearing the arguments and delivering its opinion of the insufficiency of the evidence—may rescind the conclusion, in order that the identity of the alleged testator may be pleaded and proved. *Cargill v. Spence*. 305
3. In a suit for seaman's wages, the Judge may properly rescind the conclusion of the cause for the admission of further evidence. *Hensley and Duddridge v. Morrison*. 306

SEPARATION A MENSA ET THORO.

See *Morse v. Morse*. 220

TITHES.

1. To set out the tithe of potatoes by the tenth basket, as raised, and immediately remove the nine parts, is not sufficient: a reasonable quantity must be raised before the setting out in order to afford to the tithe-owner a fair opportunity of view. *Bearblock and Bearblock v. Meakins*. 192
2. Tithes, how far a debt discharged by a certificate of bankruptcy. *Breithwaite v. Hollingshead*. 455
3. Subtraction of tithes.—Notice as to the setting out small tithes, how far required.—Custom of the particular parish. *Filewood v. Marsh*. 455
4. Subtraction of tithes. Composition not proved. See particulars, as to tithes of crops sold, whether due from the vendor; also as to barley-rakings, mills, &c. *Filewood v. Kemp*. 455
5. Tithe of corn mills, by the tenth toll-dish, not sustained. The net profit, now held to be the rate of tithing. *Filewood v. Kemp*. 455
6. Subtraction of tithes: Endowment of the vicarage, though not in simple and positive terms, held sufficient. Matters of deduction and account, &c. *Lagden v. Robinson*. 457
7. Subtraction of tithes.—Endowment.—Small tithes.—Exemptions over-ruled. *Lagden v. Flack*. 543

U.

UNFINISHED PAPER.

1. The presumption is that a codicil, dis-

posing of realty as well as personalty, unattested, only signed by initials and with many interlineations, is unfinished and preparatory; and then it must be shown the deceased thought it would operate in its actual form, or was prevented by a sufficient cause from finishing it. *Reay v. Cowcher*. 109

2. When a paper is unfinished, the presumption of law is strong against it; especially when it is to alter an executed instrument; still more when to revoke a disposition of the bulk of the property to the deceased's own family, and transfer it to a stranger. *Ibid*. 109

W.

WILL.

1. The indorsement "Heads of Will," on a paper fairly written, signed, and dated, lets in parol evidence of intention; but the *prima facie* inference rather is, that such paper was intended to operate, if no more formal instrument were drawn up. An allegation propounding such a paper, with alterations made from time to time, adapting it to the deceased's circumstances and pleading facts inferring adherence, admitted to proof: but, on the parol evidence the paper pronounced against. *Mitchell v. Mitchell*. 29
2. Where the drawer and attesting witnesses of a will, (executed ten days before death by a person of eighty-five, in weak bodily health) are confirmed as to capacity, volition, and free agency by adverse witnesses, and by the deceased's affections, declarations, and recognitions; the general character of the drawer (an attorney employed by the deceased for many years), and slight discrepancies in the evidence of the *factum* are not material. A will, in such a case, pronounced for, and the opposer, who had pleaded incapacity, conspiracy, fraud and circumvention, condemned in the costs incurred since the giving in of his allegation. *Bird v. Bird*. 60
3. When the will of a married woman—obtained when she was in an extremely weak state nine days before death, by the active agency of the husband—the sole executor and universal legatee,—wholly departed from a former will deliberately made a few months before, the presumption is strong against the act; and the evidence not being satisfactory, the will pronounced against, and the husband condemned in the costs. *Myynn v. Robinson*. 72
4. A widow having, after the death of her husband, delivered a will made during coverture to her executor for safe custo-

dy, such delivery, coupled with other recognitions, amounts, in a Court of Probate, to a republication, rendering it a new will of which the executors are entitled to a general probate. *Miller and Ross v. Brown.* 91

5.—1st. A paper—commencing “Memorandum of my intended will,” but dispositive in terms—signed and intended to operate if no more formal will was made, is, unless revoked, entitled to probate.

2d. Neither instructions, nor a will drawn up therefrom (which, though in the deceased's possession for several months, was not executed nor shown to be finally determined on) will, either as entitled to probate or as letting in an intestacy, revoke such a paper. *Barwick v. Mullings.* 98

6.—1. Where a testator executed a will and two codicils, and afterwards had a new will and certain bonds prepared which were, in conjunction, to dispose of his property, on the same principle as his former will, and died when preparing to sign the new will; first, the execution being thus finally determined on and prevented, the new will is entitled to probate; and secondly, the new will never being intended to operate independent of the bonds, the Court is bound, in order to carry his intentions most nearly into effect, to grant probate of the new will and of the unexecuted bonds, as together containing his will; and to revoke a probate of the former papers.

2. Where there is final intention proved and execution prevented by the act of God, the mere want of execution does not invalidate an instrument disposing of personalty. The disposition has the same legal effect, as if the instrument had been actually signed and attested.

3. When a paper is not intended as a will, but as an instrument of a different nature, if it cannot operate in the latter, it may in the former character; for the form does not affect its title to probate, provided it is to carry into effect the intention of the deceased after death.

Masterman v. Maberly. 103

7. A will being executed in duplicate, one part of which was proved to have been in, and was never traced out of, the deceased's possession, and was not found at his death, the *prima facie* presumptions are; first, that the testator destroyed the part in his own possession; and second—(if the first be not repelled), that he intended thereby to revoke the duplicate not in his possession. The deceased pronounced dead intestate.

Cobin v. Fraser and others. 113

8. The *prima facie* presumption, that the deceased revoked a will, which was in his own possession, but is either not found at all at his death, or is found cancelled; and the *prima facie* legal consequence that a duplicate, not in his possession, is revoked thereby, may be rebutted by a strong combination of circumstances leading to a moral conviction, or direct positive evidence. *ibid.*

9. In order to rebut a presumption of law, (e. g. as to the destruction of a will by a testator), declarations unsupported by circumstances strongly marking their sincerity, and confirming their probability (especially where their stringency depends on the exact words of a casual expression), cannot safely be relied on. *ibid.*

10. Declarations, coupled and consistent with conduct and acts, are of weight in proof of intention, so are those not depending on the precise words of a particular expression, but on the tenor of an extended conversation, especially if not liable to the suspicion of insincerity; still more if repeatedly made in confidential communications. *ibid.*

11. A second marriage and the birth of issue is not a revocation of a will made in favour of the children of a former marriage and an illegitimate child, where the second wife has some real property settled on her issue under her father's will, and where the deceased had possession and full knowledge of the existence of such a will. *Johnson v. Welch.* 214

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